

## Notes and Comment

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## Notes and Comment

*Constitutional Law: Constitutionality of Bulk Sales Statutes.*—The Bulk Sales Law is the subject of a decision recently handed down by Justice Van Sicken in the case of *Klein v. Marvelas*, 94 Misc. (N. Y.) 458 (1916). This decision declares the statute unconstitutional, and, in view of the fact that it had just been declared constitutional by another branch of the Supreme Court in the case of *Apex Leasing Co. v. Litke and Litke Stores, Inc.*<sup>1</sup>, the status of the law is left in much doubt.

The first bulk sales statute passed in New York<sup>2</sup> made the sale of merchandise in bulk fraudulent and void as against creditors unless certain prescribed conditions were complied with. These conditions were that the seller and purchaser, at least five days before the sale: (1) make an inventory showing the quantity and, so far as possible, the cost price of each article to be included in the sale; (2) send notice to the seller's creditors of the proposed sale, of the stated cost price of the merchandise, and the price to be paid for the same by the purchaser; (3) file a truthful answer to the inquiries as to the above information. This statute was construed in the case of *Wright v. Hart*<sup>3</sup> and declared unconstitutional on the grounds that it was class legislation and that it was in contravention of the due process clause. This statute was amended in 1904<sup>4</sup> by declaring such sales *presumptively void* and exempting from its operation executors, administrators, receivers, and public officers conducting a sale in his official capacity. This amended statute was declared constitutional as merely creating a rule of evidence. In 1907<sup>5</sup> a third act was passed which was similar in substance to the act of 1904. This statute remained in force until 1914 when the present statute was passed<sup>6</sup>. The present statute is similar to the original statute in that it makes the sale *void* if the conditions are not performed. The conditions are practically the same as in the original statute, except that this statute does not require a filing of the answers to the inquiries of the law as was required in the original statute and exempts from its operation general assignments made for the benefit of creditors, and sales by executors, administrators, receivers, trustees in bankruptcy, assignees under a voluntary assignment for the benefit of creditors, or any public officer under judicial process.

Similar statutes regulating the sale of goods in bulk have been passed in forty-five states<sup>7</sup> and it is significant that in all the litigation

<sup>1</sup>93 Misc. (N. Y.) 353 (1916).

<sup>2</sup>Laws of 1902, chap. 528.

<sup>3</sup>182 N. Y. 330 (1905).

<sup>4</sup>Laws of 1904, chap. 569.

<sup>5</sup>Laws of 1907, chap. 722.

<sup>6</sup>Laws of 1914, chap. 507.

<sup>7</sup>Arizona, Laws of 1909, chap. 47; Arkansas, Acts of 1913, Act 88, p. 326; California, Act of Mar. 10, 1903, amending sec. 3440 of the Civil Code; Colorado

arising therefrom only five cases have been found declaring the statutes unconstitutional.<sup>8</sup> The great majority of states, on the other hand, have declared such statutes constitutional.<sup>9</sup> It has been submitted by some writers on the subject that, although the statutes creating a rule of evidence, making the sale presumptively void, should be declared constitutional, the statutes making the sale void, if the conditions were not performed, are unconstitutional. This distinction would not seem to be based upon sound principle since in many cases the courts have declared "presumptively void" to mean "conclusively presumed to be void", and thus the same

Laws of 1903, chap. 110; Connecticut, General Statutes, secs. 4867-4869; Delaware, Laws of 1903, chap. 387; Dist. of Columbia, U. S. Statutes at Large, 58th Cong., chap. 1809; Florida, Act of May 27, 1907; Georgia, Laws of 1903, No. 457; Idaho, Acts 1903, p. 11-12; Illinois, Acts 1905, p. 284; Indiana, Acts 1909, p. 122; Iowa, Supplemental Supplement, Code of Iowa (1915) sec. 2911a; Kentucky Acts, 1904, chap. 22; Louisiana, Acts 1896, No. 94; Maine, Acts 1905, p. 119; Maryland, Laws 1908, chap. 704; Massachusetts, Acts and Resolves 1903, chap. 415; Michigan, Acts 1905, No. 223; Minnesota, Rev. Laws, sec. 3503; Mississippi, Act of Mar. 6, 1908; Montana, Act of Mar. 7, 1907; Nebraska, Act of Mar. 4, 1907; Nevada, Rev. Laws (1912), sec. 3908; New Hampshire, Public Statutes, chap. 273, following sec. 10; New Jersey, Acts of 1907, chap. 237; New Mexico, Laws 1915, chap. 22; New York, Laws 1914, chap. 507; North Carolina, Laws 1907, chap. 623; North Dakota, Civil Code, sec. 7224; Ohio, Act of Apr. 30, 1908; Oklahoma, Act of May 26, 1908; Oregon, Ann. Codes and Statutes (1902), secs. 4623-4626; Pennsylvania, Acts 1905, No. 44, p. 62; Rhode Island, Laws 1909, chap. 387; South Carolina, Acts 1906, p. 1; South Dakota, Laws 1913, chap. 116; Tennessee, Acts 1901, chap. 133; Texas, Act of Mar. 1, 1909; Utah, Comp. Laws (1907), title 71, secs. 2063x-2063x4; Vermont, Public Statutes (1906), chap. 216; Virginia, Code (1904), sec. 2460a; Washington, Laws 1901, chap. 109; West Virginia, Acts 1909, chap. 78; Wisconsin, Laws 1901, chap. 463;

<sup>8</sup>Off and Company v. Morehead, 235 Ill. 40 (1908); this case is exceptional inasmuch the statute merely declared the sale presumptively void. Wright v. Hart, 182 N. Y. 332 (1905). Block v. Schwartz, 27 Utah 387 (1904); the statute here made a sale without compliance with its provisions a misdemeanor. McKinster v. Sager, 163 Ind. 671 (1904); the act construed in this case excluded from the benefit of the act all creditors except merchants, and this classification was held too narrow; the act was amended and held constitutional in Hirth-Krause Co. v. Cohen, 177 Ind. 1 (1912). Miller v. Crawford, 70 Ohio State 207 (1904); decision went on ground that it was class legislation being confined to merchants; this case was followed in Williams v. Preslo, 84 Ohio St. 328 (1910).

<sup>9</sup>Walp v. Mooar, 76 Conn. 515 (1904); Goldstein v. Maloney, 62 Fla. 198 (1911); Jaques Tinsley Co. v. Carstarphen Co., 131 Ga. 1 (1908); Boise Assn. of Credit Men v. Ellis, 26 Idaho 438 (1914) and see note to same in L. R. A. 1915 E. 917; Hirth-Kraus Co. v. Cohen, 177 Ind. 1 (1912); State v. Artus, 110 La. 441 (1903); McGray v. Woodbury, 110 Me. 163 (1912); Hart v. Roney, 93 Md. 432 (1901); Squire and Co. v. Tellier, 185 Mass. 18 (1904); Spurr v. Travis, 145 Mich. 721 (1906); Thorpe v. Pennock Mercantile Co., 99 Minn. 22 (1906); Moore Dry Goods Co. v. Rowe, 97 Miss. 775 (1911); Wheeler & Motter Co. v. Moon, 49 Mont. 307 (1914); Appel Mercantile Co. v. Barker, 92 Neb. 669 (1912); Kett v. Masker, 86 N. J. L. 97 (1914); Pender v. Speight, 159 N. C. 612 (1912); Humphrey v. Wagon Works, 37 Okla. 714 (1913); Coach v. Gage, 70 Ore. 182 (1914); Feingold & Co. v. Steinberg, 33 Pa. Super. Ct. 39 (1907); Neas v. Borches, 109 Tenn. 398 (1902); Nash Hdw. Co. v. Morris, 105 Tex. 217 (1912); McDaniels v. Connelly Shoe Co., 30 Wash. 549 (1902); Fisher v. Herrmann, 118 Wis. 424 (1903); Lemieux v. Young, Trustee, 211 U. S. 489 (1909); Kidd Dater & Price Co. v. Mussehnann Grocer Co., 217 U. S. 461 (1910).

result is reached as in the case of declaring the sale absolutely void. The question would rather seem to be whether the statutes are unconstitutional as depriving a person of property without due process of law, or as class legislation.

The question of due process has been before the courts in a great number of instances and it is settled that a statute does not deprive one of property without due process in the constitutional sense, "simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interests or the rights of others." When legislation is passed under the police power for the prevention of fraud it infringes the constitutional guaranty only when it is extended to subjects not within its scope.<sup>10</sup> It is conceded that it is within the police power for the legislature to enact *reasonable* laws for the prevention of fraud and the protection of creditors.<sup>11</sup> It would seem, therefore, that the question as to whether these statutes infringed the due process clause depended entirely upon the reasonableness of the conditions prescribed.

As to the other argument that the statutes, being confined to merchants, are class legislation, it has been held<sup>12</sup> by the United States Supreme Court that this classification is based upon a reasonable distinction if the act applies to all persons in the state who are engaged in the selling of merchandise. It certainly would seem as reasonable a distinction as one upheld in the New York Court of Appeals<sup>13</sup> which allowed gambling inside the fence at horse races but made it illegal outside the fence. We come, then, to the conclusion that if the statute imposes reasonable conditions it should be held constitutional.

The evil sought to be suppressed by the statute is the practice of certain merchants, when heavily in debt, of making secret sales of their merchandise in bulk for the purpose of defrauding creditors. It can be readily seen that the evil is universal in extent when the number of states having statutes regulating such sales is considered.<sup>14</sup> The evil, being done in secret, is hard for the courts to unravel because the evidence must come almost entirely from hostile witnesses and can easily be covered by perjury. It is true that the statutes may work hardship in some cases but a possible application to extreme cases is not the test of reasonableness of public rules and regulations.<sup>15</sup>

Coming now to the present New York statute, are the conditions there laid down unreasonable so as to make the statute unconstitutional? In so considering the statute we must keep in mind the evil

<sup>10</sup>See dissenting opinion of Vann J. in *Wright v. Hart* *supra* note 3 at page 353.

<sup>11</sup>*Wright v. Hart*, *supra*, note 3.

<sup>12</sup>*Lemieux v. Young, Trustee*, *supra*, note 9.

<sup>13</sup>See dissenting opinion of Cullen, Ch. J. in *Wright v. Hart*, *supra*, note 3, at page 360.

<sup>14</sup>See list of cases under note 7.

<sup>15</sup>*Commonwealth v. Plaisted*, 148 Mass. 375 (1889).

to be remedied and its extent. As to the inventory demanded, an inventory of the goods to be sold is demanded in any case by the prudent vendee and the addition of the cost price of each article is a mere detail. The notice to the creditors, demanded to be given at least five days before the sale is completed, would not seem unreasonable especially when it is considered that in many cases the creditors of the seller practically have a greater interest in the goods to be sold than the seller himself. In view of the numerous recording acts passed in the behalf of purchasers it would seem that they are in a poor position to complain of the few conditions imposed by this statute.

The provisions of the New York Constitution so far as this question is involved are the same as the privileges and immunities clause of Section 1 of the 14th amendment to the Constitution of the United States, and as the act from which the New York act was copied has been held by the Supreme Court of the United States<sup>16</sup> not violative of the 14th amendment, it would seem not to violate the privileges and immunities section of the New York Constitution but to be a proper exercise of police power.

It is noteworthy that Justice Van Sicken in his opinion in *Klein v. Marvelas*, *supra*, believed the present statute to be reasonable but felt bound by the decision in *Wright v. Hart*, *supra*. This position is hard to reconcile in view of the fact that the statute considered in *Wright v. Hart* was a different statute from the present one. As pointed out above, the present law does not require the filing of answers to the inquiries of the statute, as that construed on *Wright v. Hart* did, and it makes certain sales exempt from its operation. Without such exceptions the law would greatly hamper the administration of estates and retard the enforcing of judicial process. The *Hart* case was decided by a divided bench of five judges to four. It is barely possible that, had the exemptions made in the present statute been in the statute there construed and the requirement of filing the answer to the inquiries been omitted from that statute as has been done in the present statute, the question would have been decided differently. In any case it is hard to see how the court in the *Klein* case was bound by the decision construing a different statute in view of the decisions of the United States Supreme Court<sup>19</sup> on the subject.

Frank B. Ingersoll, '17.

*Contract: Agreements Tending to Oust the Jurisdiction of the Courts.*—By a recent decision of the Supreme Judicial Court of Massachusetts in *Nashua River Paper Co. v. Hammermill Paper Co.*, 111 N. E. 678 (1916), it was held that a stipulation in a commercial contract between a corporation domiciled in Massachusetts and a corporation incorporated in Pennsylvania, that no action should be maintained against the latter corporation in any state or federal court other than the courts of Common Pleas of Pennsylvania, was unenforceable and

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<sup>16</sup>Kidd, Dater & Price Co. v. Musselman Grocer Co., *supra*, note 9.

did not preclude the maintenance of such an action in the courts of Massachusetts. In reaching this conclusion, the court followed the principle laid down in *Nute v. Hamilton Ins. Co.*,<sup>1</sup> the leading Massachusetts case on the subject. There a stipulation that action was to be brought only in one particular county was held invalid. The case seemed to rest on the ground that it is not within the province of the parties to enter into any agreement concerning the remedy for a breach of contract, since such remedy is created and regulated by law, and the parties cannot, by agreement, take away jurisdiction from the courts where the law has given it. It has also been said that the reason for the rule, that a provision in a contract by which the parties seek to deny the right of one or both to resort to any court of competent jurisdiction is invalid, is that the courts guard with jealous eyes any contract innovations upon their jurisdiction. The *Nute* case, *supra*, has been followed or cited in nearly every jurisdiction where the question has arisen,<sup>2</sup> although a Massachusetts case, *Mittenhal v. Mascagni*,<sup>3</sup> has made an exception to the rule, where the peculiar facts of a case show that such a stipulation, providing for the bringing of suit in only one jurisdiction, is reasonable under all the particular circumstances of the case. The court in the principal case, however, declared that the *Mittenhal* case was not to be taken as extending or liberalizing the rule of the *Nute* case, *supra*, and that, while the *Mittenhal* case was sound upon its own peculiar facts, to extend its principle to the case in hand would involve overruling the *Nute* case. We may understand by this, then, that the principle of the *Mittenhal* case is to be narrowly confined to cases having a similar state of facts.

Generally, however, a provision like that in the principal case is not binding whether it be to the effect that suit shall be brought only in a certain court,<sup>4</sup> or in a certain county,<sup>5</sup> or state,<sup>6</sup> or that suit shall not be brought in a certain court.<sup>7</sup>

<sup>1</sup>6 Gray (Mass.) 174 (1856).

<sup>2</sup>*Healy v. Eastern Bldg. & Loan Ass'n*, 17 Pa. Super. Ct. 385 (1901); *Savage v. People's Bldg., Loan & Savings Ass'n*, 45 W. Va. 275 (1898); *Blair v. Nat. Shirt & Overalls Co.*, 137 Ill. App. 413 (1907); *Darling v. Protective Assurance Society of Buffalo*, 71 Misc. (N. Y.) 113 (1911); for exhaustive collection of authorities, see 47 L. R. A. (N. S.) 352 (1911).

<sup>3</sup>183 Mass. 19 (1903).

<sup>4</sup>*Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508 (1897); *Blair v. Nat. Shirt & Overalls Co.*, *supra*, note 2; *Darling v. Protective Assurance Society of Buffalo*, *supra*, note 2.

<sup>5</sup>*McLean v. Tobin*, 58 Misc. (N. Y.) 528 (1908); *Savage v. People's, etc., Ass'n*, *supra*, note 2; *Healy v. Eastern, etc. Ass'n*, *supra*, note 2. See, however, *Benson v. Eastern Bldg. & Loan Ass'n*, 174 N. Y. 83 (1903), where a stipulation that action was to be brought only in the county of Onondaga was held valid, because it affected only the venue of the action and did not tend to oust the jurisdiction of the Supreme Court, since in New York there is but one Supreme Court and the court, when it sits in Onondaga county and when it sits in any other county, is exactly the same court. Therefore, the agreement of the parties to bring suit in one particular county would not oust the jurisdiction of the Supreme Court.

<sup>6</sup>*Buel v. Baltimore, etc. R. R. Co.*, 24 Misc. (N. Y.) 646 (1898).

<sup>7</sup>*Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445 (1874); *Barron v. Burnside*, 121 U. S. 186 (1886).

There is another class of agreements which are akin to that in the principal case, viz., those which contain a clause providing for the "reference to arbitration," i. e., to one or more persons as arbitrators or referees, of all disputes which may arise under the contract. The common law regarded such agreements as tending to oust the jurisdiction of the courts and refused to enforce them on grounds of public policy. The reason for the rule adopted by the courts is by some traced to the jealousy of the courts<sup>8</sup> and a desire to repress all attempts to encroach upon their jurisdiction; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced.

The modern tendency is to relax the common law rule,<sup>9</sup> and while the courts hold that a clause providing for the arbitration of *all* matters in dispute,<sup>10</sup> or for the arbitration of future disputes about matters of *law*,<sup>11</sup> is unenforceable, as tending to oust the jurisdiction of the courts, the following qualification is made in all modern decisions: that an agreement to refer to arbitration all disputes as to questions of *fact*, is binding and valid, whether such agreement is in form a covenant or a condition precedent to bringing suit.<sup>12</sup> It should be noted that, as an exception in most states, a general clause for the arbitration of *all* matters in dispute within fraternal or mutual benefit societies is valid and binding on the parties.<sup>13</sup> It should also be noted that the invalidity of a clause providing for arbitration will not invalidate the whole contract.<sup>14</sup> If the clause is invalid, it is merely ignored.

The principles above set forth were followed in a recent New York case.<sup>15</sup> In that case a clause of a railroad construction contract, providing for the decision by the railway company's chief engineer of

<sup>8</sup>First Nat. Bank of Kansas City v. White, 220 Mo. 717 (1909).

<sup>9</sup>Hood v. Hartshorn, 100 Mass. 117 (1868); Delaware & Hudson Canal Co. v. Pa. Coal Co., 50 N. Y. 250 (1872).

<sup>10</sup>U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (1915); Sutro v. H. W. Balk, Inc., 151 N. Y. Sup. 764 (1915); Tilden v. Bernhard, 31 Ohio Cir. Ct. 255 (1909); Jefferson Fire Ins. Co. v. Bierce & Sage, 183 Fed. 588 (1910); Williams v. Branning Mfg. Co., 154 N. C. 205 (1911); Nat. Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209 (1908); Miles v. Schmidt, 168 Mass. 339 (1897); Meacham v. Jamestown, etc. R. R. Co., 211 N. Y. 346 (1914); 2 Elliott on Contracts, p. 77. Supreme Council v. Forsinger, 125 Ind. 52 (1890).

<sup>11</sup>Sanitary District v. McMahon etc., Co., 110 Ill. App. 510 (1903).

<sup>12</sup>Ruch v. York City, 233 Pa. 36 (1911); Jefferson Fire Ins. Co. v. Bierce & Sage, *supra*, note 10; Delaware & Hudson Canal Co. v. Pa. Coal Co., *supra*, note 9; Hamilton v. Liverpool, etc. Ins. Co., 136 U. S. 242 (1890); 2 Elliott on Contracts, p. 78. In Pennsylvania such an agreement was held revocable by either party because the arbitrators were not named: Commercial Union Ass. Co. v. Hocking, 115 Pa. 407 (1886).

<sup>13</sup>Rood v. Railway, etc. Ass'n, 31 Fed 62 (1887); Van Pouke v. St. Vincent de Paul Society, 63 Mich. 378 (1886); Robinson v. Templar Lodge, 117 Cal. 370 (1897).

<sup>14</sup>Jefferson Fire Ins. Co. v. Bierce & Sage, *supra*, note 10; Williams v. Branning Mfg. Co., *supra*, note 10; Sutro v. H. W. Balk, Inc., *supra*, note 10; 2 Elliott on Contracts, p. 78.

<sup>15</sup>Meacham v. Jamestown, F. & C. R. R. Co., 211 N. Y. 346 (1914).

all disputes under the contract, was held to provide for an adjustment of all questions to the exclusion of the jurisdiction of the courts and hence to be against public policy and unenforceable. The court recognized the validity of provisions in a contract providing for arbitration to determine facts, or to ascertain amounts and values,<sup>16</sup> and in condemning the provision stated above, declared, "If the judgment of the court below is to stand, jurisdiction over controversies, arising under such contracts, may be withdrawn from our courts and the litigation remitted to arbitrators in distant states. The presence of the parties here, the ownership of property in this jurisdiction, these and other circumstances may make resort to our courts essential to the attainment of justice. If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from this and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary. The jurisdiction of our courts is established by law, and it is not to be diminished, any more than it is increased by the convention of the parties."

*Fred S. Reese, Jr., '18.*

*Contracts: Compromise and Settlement: Groundless Claim.*—In the case of *Daniel v. Hughes*, 72 So. (Ala.) 23 (1916), the Alabama Supreme Court recently decided contrary to the prevailing view in cases of compromise of a disputed claim. It appears that a controversy had arisen between the plaintiff and defendant in respect to the sale of some land, or the procuring of a purchaser thereof. The exact nature of the controversy does not appear. Plaintiff brought an action claiming from the defendant \$1,500 damages for the breach of an agreement entered into by which the defendant promised, in consideration of the settlement of the dispute in regard to the land, to pay plaintiff \$900. In delivering the opinion of the court, Anderson, Ch. J., concludes that the original claim of the plaintiff was groundless and not a valid claim because none of the counts aver that anything was due the plaintiff from the defendant upon the original transaction. Therefore, the original claim not being tenable, the compromise of the dispute was not supported by a good consideration.

In regard to this question there are two lines of conflicting opinion. The majority of the jurisdictions hold that an agreement made in compromise of a disputed claim, or to avoid or to settle a litigation, is based upon a sufficient consideration, whether the claim is enforceable or not, provided the parties acted in good faith when they entered into the compromise.<sup>1</sup> These courts refuse to go behind the compromise,

<sup>1</sup>*Smith v. Richards*, 29 Conn. 232 (1860); *Sigsworth v. Coulter*, 18 Ill. 204 (1856); *Keefe v. Vogle*, 36 Iowa 87, (1872); *Flannagan v. Kilcome*, 58 N. H. 432 (1878); *Clark v. Hunter*, 28 N. Y. 389 (1863); *White v. Hoyt*, 73 N. Y. 505 (1878); *Feeter v. Weber*, 78 N. Y. 334 (1878); *Dovale v. Ackerman*, 11 Misc. (N. Y.) 245 (1893); *Russell v. Cook*, 3 Hill (N. Y.) 504 (1842); *Grandin v. Grandin*, 49 N. J. L. 508 (1887). The law in England seems to be in accord. See *Callisher v. Bischoffsheim*, L. R. 5 Q. B. 449 (1880); *Ockford v. Barelli*, 25 L. T. 504 (1876). For a further list of cases see Professor Williston's edition of Wald's "Pollock on Contracts", 3d. American Edition, p. 214 (23).



saying that, if parties wish to forbear the annoying consequences of a law suit, they should be allowed to do so, and that this compromise is supported by a good consideration.<sup>2</sup> Other courts, in accord with the principal case, hold that in order to support the compromise of a disputed claim, the claim must be an actual one or founded upon a colorable right about which there is room for doubt, and where the claim is not capable of being sustained at law or in equity, its compromise has no legal consideration.<sup>3</sup> They argue that it is no detriment to the promisee to yield a claim which he never legally had. The courts which sustain the compromise do so on the ground of public policy in order to void the expense of litigation. It is clear, then, that where the sufficiency of the consideration is tested by the soundness of the original claim, the purpose of entering into the contract is totally defeated, for, while certain compromise settlements are held valid in these states, namely where the claim is really doubtful in law, nevertheless it takes a suit to settle the question as to whether the original claim was doubtful or meritorious, and the parties are therefore, never immune from suit. It follows then, that there is no inducement to enter into the compromise, for, if the parties may be called upon to litigate their original claim anyway, they might better never have entered into the compromise. It will be seen that the compromise may serve no useful purpose in those states.

Most of the jurisdictions in this country sustain the compromise and do not undertake to pass upon the validity of the original claim when the compromise comes before them, being satisfied with the agreement, provided no element of fraud or duress is alleged. Public policy seems to dictate that such agreements should be upheld in order to void as far as practicable the opening up of these settlements which the parties themselves have agreed upon.

Geo. W. Dunn, '18.

*Contract: Performance to Satisfaction.*—In *Hanaford v. Stevens & Co.*, 98 Atl. (R. I.) 209 (1916), the plaintiff entered into a contract to act as traveling salesman for the sale of optical goods for defendants for a period of three years and three months, agreeing "to perform in every particular all the various duties of his position in a faithful, efficient and satisfactory manner." After two years the defendant discharged the plaintiff on the ground that his services were not satisfactory. In an action for damages the court rendered judgment for the plaintiff which was affirmed on appeal.

The question involved is one of contract of performance to the satisfaction of a party. The court treated the subject in the conventional way, separating the cases of this general character into two classes; one class in which the subject of the contract involves personal taste or feeling; and the other class where the subject matter is such that the satisfaction stipulated for applies to quality, workmanship, saleability and other like considerations; the court

<sup>2</sup>Dolcher v. Fry, 37 Barb. (N. Y.) 152, 157 (1862).

<sup>3</sup>Ware v. Morgan 67 Ala. 461 (1880); Gunning v. Royal, 59 Miss. 45 (1881); Sullivan v. Collins, 18 Iowa 87 (1865); Home Ins. Co. v. Skoumal, 51 Neb. 655 (1906). See also 9 Cyc. 341.

holding that, as to the first class, the buyer was the sole judge and that in the second class the agreement that it shall be satisfactory must mean that it shall be "reasonably satisfactory."

In the discussion of the subject the court apparently obscures the underlying principle that a person has a perfect right to contract for performance to his sole satisfaction in all cases. Whether or not a person has contracted for performance to his sole satisfaction is a question of construction in each case. In matters involving personal taste and feelings it is the settled construction that he so contracted.<sup>1</sup> The courts recognize that in matters of this kind there is no absolute standard as to what is good or bad and leave each man free to act on his own ideas, tastes or prejudices, as the case may be. If the party so contracting is dissatisfied, the other party is not entitled to recover, even though the dissatisfaction may have been unreasonable.<sup>2</sup> But in matters involving mechanical fitness and utility where the rejection of the work or chattel would not put the other party in as good a position as he was before, the contract will ordinarily be construed as meaning that he intended to contract that he would be satisfied with what in reason he ought to be satisfied.<sup>3</sup> He is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible. In a few instances<sup>4</sup>, however, even where operative fitness and mechanical utility are involved, courts have allowed the defendant the absolute right of rejection, but in these cases the intent was so clearly expressed that performance be to the sole satisfaction of defendant, that the contract was incapable of any other construction, one court saying: "It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He will not enter into any bargain except upon the condition of reserving the power to do what others might regard as unreasonable."<sup>5</sup>

The court in the principal case says that the defendant must act in good faith in refusing to perform his part of the contract. This is insufficient. He must not only show that he was really dissatisfied but must also show that his dissatisfaction is the reason for his refusal to perform. The dissatisfaction must be honest and sincere and not

<sup>1</sup>Zaleski v. Clark, 44 Conn. 218 (1876); Brown v. Foster, 113 Mass. 136 (1873); White v. Randall, 153 Mass. 394 (1891); McCarren v. McNulty, 7 Gray (Mass.) 139 (1856); Gibson v. Cranage, 39 Mich. 49 (1878); Moore v. Goodwin, 43 Hun (N. Y.) 534 (1887); Johnson v. Bindseil, 15 Daly (N. Y.) 492 (1890); Marshall v. Ames, 11 Ohio Cir. Ct. R. 363 (1896); Meacham v. Gardner, 27 Pa. Super Ct. 296 (1905); Pennington v. Howland, 21 R. I. 65 (1898).

<sup>2</sup>Zaleski v. Clark, *supra*, note 1.

<sup>3</sup>Electric Lighting Co. v. Elder Bros. 115 Ala. 138 (1897); Keeler v. Clifford, 62 Ill. App. 64 (1895); Hawkins v. Graham, 149 Mass. 284 (1889); Duplex Safety Boiler Co. v. Garden et al., 101 N. Y. 387 (1886); Pennington v. Howland, *supra*, note 1.

<sup>4</sup>Wood Reaping Machine Co. v. Smith, 50 Mich. 565 (1883); Gray v. Central R. R. Co., 11 Hun (N. Y.) 70 (1877); Singerly v. Thayer, 108 Pa. St. 291 (1885).

<sup>5</sup>Wood Reaping Machine Co. v. Smith, *supra*, note 4.

feigned.<sup>6</sup> Otherwise the promisor would not be bound by his agreement unless he later wished to be so and the agreement would not be a contract, for it would lack mutuality of obligation.

In New York the cases may be divided into the two usual groups. In cases involving personal taste and feeling the courts have invariably decided that performance must be to defendant's sole satisfaction.<sup>7</sup> In the mechanical utility cases perhaps the case most frequently cited is *Duplex Safety Boiler Co. v. Garden*.<sup>8</sup> In that case the parties contracted for the alteration of certain boilers to be paid for only when the defendants were "well satisfied that the boilers as changed were a success." The defendants pleaded non-satisfaction but the plaintiff was allowed to recover, the court saying "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." The result of the case is no doubt proper, but the reasoning of the court is open to criticism. The court says that "if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation and consequently no agreement which could be enforced." But the parties have left it to defendant to say whether he is satisfied and, if he determines that he is satisfied, then he is under obligation to perform. Although the courts have construed an agreement of this kind when mechanical utility is involved so that defendant must be satisfied with what in reason ought to satisfy him, it does not necessarily follow that there would be no obligation and consequently no agreement which could be enforced. The court cited with approval *Folliard v. Wallace*.<sup>9</sup> There the defendant covenanted that in case the title to a lot of land conveyed to him by the plaintiff should prove good and sufficient in law against all other claims he would pay plaintiff \$150 three months after he should be "well satisfied" that the title was undisputed. Defendant pleaded that he was not well satisfied, but the court held for plaintiff and said "a simple allegation of dissatisfaction, without some good reason assigned for it might be a mere pretext and cannot be regarded." The reasoning is fallacious. The parties have contracted for performance to satisfaction and the defendant has the right to decide whether he is satisfied. It is not for the court to deny him that right because there is a possibility that he might allege dissatisfaction as a pretext, if in fact there was no evidence that his dissatisfaction was feigned.

Harvey I. Tutchings, '18.

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<sup>6</sup>*Lighting Co. v. Elder Bros.*, 115 Ala. 138 (1897); *Carpenter v. Chemical Co.*, 98 Va. 177 (1900); *Plumbing Co. v. Carr*, 54 W. Va. 272 (1903).

<sup>7</sup>*Butler v. Tucker*, 24 Wend. (N. Y.) 446 (1840); *Hoffman v. Gallaher*, 6 Daly (N. Y.) 42 (1875); *Spring v. Clock Co.* 24 Hun (N. Y.) 175 (1881); *Glenny v. Lacy*, 1 N. Y. Supp. 513 (1888); *Gray v. Alabama Nat. Bank*, 10 N. Y. Supp. 5 (1891); *Haven v. Russell*, 34 N. Y. Supp. 292 (1895); *Walker v. Thompson Co.*, 56 N. Y. Supp. 326 (1899); *Dermody v. Flesher*, 49 N. Y. Supp. 150 (1898); *Crawford v. Mail Publishing Co.*, 163 N. Y. 404 (1900).

<sup>8</sup>101 N. Y. 387 (1886).

<sup>9</sup>2 Johns. (N. Y.) 395 (1807).

*Criminal Law: Offer to Accept Smaller Salary as Bribery under Corrupt Practices Act.*—In the recent case of *Prentiss v. Dittmar*, 112 N. E. (Ohio) 1021 (1916), Prentiss, the plaintiff in error, was the successful candidate for the office of Common Pleas judge. Before his induction into office, Dittmar, one of the unsuccessful candidates filed a petition with the Court of Appeals, contesting the validity of the election. The petition, among other things, alleged that Prentiss, as a candidate, and for the purpose of inducing voters to vote for him, caused to be printed and widely distributed certain circulars containing a promise that, in the event of his election, he would not accept certain fees which were payable to him out of the local treasury, but would only accept that part of his salary which was payable out of the state treasury. The petition contained no allegation that these statements influenced any voters to vote for Prentiss, but it did allege that they were used by the plaintiff in error as "arguments for the purpose of inducing the electors to vote for him." The Court of Appeals held the election invalid, whereupon the case was appealed.

The Supreme Court of Ohio held that such a promise, extended to the voters of a community, fell within the inhibition of the Corrupt Practices Act in force in that state,<sup>1</sup> which act provides that any person is guilty of corrupt practice, if he, in connection with, or in respect of any election, contributes, or offers to contribute, any money or valuable consideration, for any other purposes than those detailed therein. The court therefore affirmed the judgment of the Court of Appeals.

This holding seems to be in accord with the majority of the American cases.<sup>2</sup> In an early Kansas case,<sup>3</sup> where the candidate agreed to accept a smaller salary than that stipulated by law, the court ruled that such an offer to accept a salary which would reduce the tax upon each taxpayer approximately one dollar, was equivalent to a direct offer by the candidate to pay one dollar of each man's taxes. The court, in the course of the argument, said, "The theory of popular government is that the most worthy should hold office. Personal fitness \* \* \* and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions \* \* \* is the single test which the law will recognize. That which throws other considerations into the scale \* \* \* tends to turn the thought of the voter from the one question which should be paramount in his mind when he deposits the ballot. It is bribery, more insidious, and, therefore, more dangerous, than the grosser form of directly offering money to the voter."

In the principal case, it seems that, under the Ohio statute, it was not necessary to allege and prove that electors were in fact influenced by the promise made. In Wisconsin, however, the statute requires

<sup>1</sup>Sec. 5175-26, Ohio General Code.

<sup>2</sup>State ex rel. Attorney General v. Collier, 72 Mo. 13 (1880); Carrothers v. Russell, 53 Iowa 346 (1880); State ex rel. Newell v. Purdy, 36 Wis. 213 (1874); Bush v. Head, 154 Cal. 277 (1908); Galpin v. City of Chicago, 269 Ill. 27 (1915); Alvord v. Collin, 20 Pick. (Mass.) 428 (1838); Clements v. Humphries, 74 Tex. 466 (1889).

<sup>3</sup>State ex rel. Bill v. Elting, 29 Kan. 397 (1883).

that the candidate shall have induced or procured an elector to vote for him by bribery, in which event it is necessary not only to allege that certain voters were induced and procured, but to prove that they were so influenced by the offer.<sup>4</sup>

The courts distinguish between this class of cases and those in which the candidate promises to do certain things in the interest of reform, economy, and a rigid administration of office.<sup>5</sup> The former savour of vicious tendencies, and tend to break down the test of personal fitness for office, while the latter class deals with promises made in the interest of the public and are entirely consistent with personal integrity and the preservation of the government.

Another class of cases which should be distinguished from the principal case, comprises those cases in which a promise is made to the electors generally, by a municipality, or by a citizen thereof, to donate money or other property to the county, if such municipality shall be selected as the county seat, at an election held for the purpose of deciding upon the location thereof. This is held, by the majority of the courts,<sup>6</sup> not to constitute bribery. But in the case of *Ayers v. Moan*,<sup>7</sup> the court held that even this sort of promise constituted bribery, citing an earlier Nebraska case,<sup>8</sup> in which the court said, "The whole course of our legislature is against every species of bribery or inducement of that nature at elections. What would be thought of a candidate for public office who should promise the electors \$3,000 in case of his election? And does it make any difference that the candidate is a town contending for the county seat instead of an individual seeking office? The cases do not differ in principle, but in the mode of compensation." The weight of authority, in these cases, however, seems to be that such offers by a municipality or citizens thereof do not constitute bribery.

W. J. Gilleran '18.

*Domestic Relations: Annulment of Marriage for Fraud.*—The liberal tendency of the courts in annulling marriage contracts on the ground of fraud<sup>1</sup> is emphasized by the case of *Moore v. Moore*, 94 Misc. (N. Y.) 370 (1916). In that case the wife asked for annulment of the marriage on the ground of fraud. The facts showed that, when the plaintiff was about to become the mother of an illegitimate child, the defendant, the father of the child, was persuaded by friends of the plaintiff to marry her. This he did, but immediately after the marriage and before consummation, the defendant abandoned the plaintiff and remained continuously absent for six years. On these facts the court found sufficient evidence that the defendant did not intend, at the time the marriage was celebrated, to assume and fulfill

<sup>4</sup>State v. Bunnell, 131 Wis. 198 (1907).

<sup>5</sup>Carrothers v. Russell, *supra*, note 2.

<sup>6</sup>Neal v. Shinn, 49 Ark. 227 (1887); Douglas v. Baker County, 23 Fla. 419 (1887); Hawes v. Miller, 56 Iowa 395 (1881); State v. Elting, *supra*, note 3; Wells v. Taylor, 5 Mont. 202 (1884).

<sup>7</sup>34 Neb. 210 (1892).

<sup>8</sup>Herman v. Edson, 9 Neb. 152 (1879), at page 156.

<sup>1</sup>See 1 CORNELL LAW QUARTERLY 45.

the duties of a husband to a wife. The court held that this was such a fraud as to warrant the annulment of the marriage.

There were no active misrepresentations on the part of the defendant. Very evidently the fraud meant by the court was the state of the defendant's mind in speaking the words of the marriage contract, while not meaning to fulfill the same. The court said, "One who goes through the marriage ceremony represents in so many words his intention and purpose to fulfill all the obligations of a husband to the woman he marries. We can conceive of no greater fraud on a woman than for the man at the same time entertaining and carrying out the purpose of forthwith absconding and leaving his wife to her own resources, regardless of moral and legal obligations imposed by the status. Misrepresentations of purpose and intention, whether express or necessarily implied, which constitute a material fact inducing another to act, constitute a fraud affecting the validity of the contract induced thereby."

Bishop<sup>2</sup> states that in a case of marriage with intent to desert the court refuses the decree of nullity prayed for. He refers to the early Connecticut case of *Benton v. Benton*<sup>3</sup>. In that case the defendant when arrested under a bastardy process, after having gotten the plaintiff with child, married her to be freed from the process and then at once absconded. The Superior Court of Connecticut refused to annul the marriage upon the wife's petition. It laid down the rule that a marriage contract could only be annulled on the ground of fraud when the fraud was of such a nature as to render the contract unlawful from the beginning, as physical incompetency or consanguinity. The Connecticut court feared the social consequences of annulling the marriage contract for mere trivial frauds, and it shrank from laying the burden upon the courts of discriminating between the various degrees of fraud.

A half century later, however, in 1855, the Vermont court in *Barnes v. Wythe*<sup>4</sup> annulled a marriage which was plainly fraudulent, and for the purpose of imposing the care of the wife, who was a pauper, upon another town. It held that it was fraud where the husband was hired to go through the form of marriage without fulfilling or intending to fulfill its obligation. And it was such a fraud as warranted the annulment of the marriage. In *Miller v. Miller*,<sup>5</sup> in 1894, the Ohio court, on a state of facts identical with *Benton v. Benton*, granted a decree of annulment of the marriage for fraud, upon the petition of the wife. The court said, "Mere words without any intention corresponding to them will not make a marriage or any other civil contract." The court quoted *McClurg v. Terry*<sup>6</sup> in which the plaintiff and the defendant were married as a jest, neither of them understanding it would be a marriage contract, and in which the court held that it was no contract.

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<sup>2</sup>1 Bishop on Marriage, Divorce and Separation, section 476.

<sup>3</sup>1 Day (Conn.) 111 (1803).

<sup>4</sup>28 Vt. 41 (1855).

<sup>5</sup>31 Weekly Law Bulletin (Ohio) 141 (1894).

<sup>6</sup>21 N. J. Equity 225 (1870).

Only a few months after the New York decision, in *Moore v. Moore*, *supra*, the Massachusetts court in *Anders v. Anders*<sup>7</sup> passed upon the same question. In the latter case the woman married solely to secure the right to bear the name of a married woman, and so to avoid the disgrace of being the mother of the illegitimate child of another man, and with the affirmative intention of leaving the husband at the church door and never seeing him again. The marriage on the libel of the husband was annulled for fraud. The court held that just as a contract of purchase is voidable for fraud, where the buyer does not intend to pay for the goods at the time the contract is made, "a fortiori the same results follow in case of a contract to enter in the holy state of matrimony."<sup>8</sup> This same analogy was recognized in *Moore v. Moore*, *supra*, which cites *Adams v. Gillig*.<sup>9</sup> In that case the defendant induced the plaintiff to sell a vacant lot to him, by falsely stating that he intended to build a residence upon it. In fact he intended and undertook to build a public garage. The court held "that the false statements made by the defendant of his intention should, under the circumstances of the case, be deemed to be a statement of a material existing fact of which the court will lay hold for the purpose of defeating the wrong that would otherwise be consummated thereby."

It would seem that the courts have recognized that a mere state of mind, where the intention is vital to the contract, is such a fraud as will warrant the annulment of the marriage contract, where there has been no consummation. Attention should be called to the fact that in none of these cases has the court had to pass on fraudulent marriage followed by consummation. But in *Moore v. Moore*, *supra*, the court considered the fact that the marriage had not ripened into a status, and evidently was more ready to grant an annulment in view of that fact.

A very different situation is presented in this class of cases when the defrauding party seeks to annul the marriage for fraud. In *Wimbrough v. Wimbrough*<sup>10</sup> it was the husband, who after marrying to obtain a release from a bastardy process, sued for annulment of the marriage on the ground of duress. The court refused to annul the marriage. Whether such a suit is brought on the ground of duress or of fraud it must fail, when it is the defrauder who is asking for annulment. He will not be permitted to profit by his own fraud. As the court pointed out in *Miller v. Miller*<sup>11</sup> the defrauding party is estopped from denying his own declarations. It is only at the option of the defrauded party that this class of marriages will be annulled for fraud.

H. Mason Olney, '18.

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<sup>7</sup>113 N. E. (Mass.) 203 (1916).

<sup>8</sup>35 Cyc. 80 and cases cited.

<sup>9</sup>199 N. Y. 314 (1910).

<sup>10</sup>125 Md. 619 (1916).

<sup>11</sup>*Supra*, note 5.

*Domestic Relations: Survival of Actions for Breach of Promise: Special Damage.*—The case of *Quirk v. Thomas*, (1915) 1 K. B. 798, presents the question whether damages for breach of promise to marry may be recovered from the executor or administrator of the deceased promisor, or whether such action dies with him. In that case the plaintiff had given up a profitable business on the strength of the deceased's promise of marriage, and suffered heavy financial loss as well as mental anguish because of his failure to perform. Yet the action was held not to survive against his executor.

The earliest case in which this problem arose is the much cited *Chamberlain v. Williamson*,<sup>1</sup> in which the woman's executor brought the action against the promisor, and Lord Ellenborough laid down the rule that the action could not survive unless "special damage" were shown, pointing out that executors and administrators represent the temporal property, not the wrongs of the deceased, "except where those wrongs operate to the temporal injury of their personal estate." No attempt was made to define more clearly the term "special damage," and its use in this early case is ascribed to the "extreme caution" employed in deciding a case of first impression.<sup>2</sup>

This decision has never been repudiated in England, and the American states, apparently with only three exceptions, namely, North Carolina, Louisiana, and Iowa, have followed it. The first American decision on the point is *Stebbins v. Palmer*,<sup>3</sup> and there the statement that the action will not survive without special damage is repeated. Here, too, the court is cautious about venturing an opinion as to what special damage would be sufficient to cause a survival of the action, but this seems true of many courts, which simply repeat Lord Ellenborough's statement without any attempt to explain what is meant by special damage.<sup>4</sup>

Some courts, however, by *dicta* have attempted to define what they deem to be such special damage. An early definition is "damage to property, and such as would be sufficient of itself to sustain a suit."<sup>5</sup> In another case, it is said to consist of an acquisition by the defendant of some valuable addition to the estate from the plaintiff on the strength of the promise of marriage.<sup>6</sup> But the value of benefits thus conferred, if by contract, is properly recoverable anyway in quasi-contract, and such action would, of course, survive. In *Finlay v. Chirney*,<sup>7</sup> Lord Esher, after expressing "grave doubts" as to whether the action would survive even with special damage, and after remarking that he could "hardly conceive" of a case where such special damage could arise as would support the action, says that if another promise affecting the personal property of the one party or the other was made at the same time as the promise to marry, it might be such

<sup>1</sup>2 M. & S. 408 (1814).

<sup>2</sup>*Chase v. Fitz*, 132 Mass. 359 (1882).

<sup>3</sup>18 Mass. (1 Pick.) 71 (1822).

<sup>4</sup>*Lattimore v. Simmons*, 13 Serg. & R. (Pa.) 183 (1825); *Hayden v. Vreeland*, 37 N. J. L. (8 Vroom) 372 (1875); *Grubb v. Sult*, 32 Grat. (Va.) 203 (1879).

<sup>5</sup>*Hovey v. Page*, 55 Me. 142 (1867).

<sup>6</sup>*Chase v. Fitz*, *supra*, note 2.

<sup>7</sup>20 Q. B. D. 494 (1888).



special damage. There need not have been an express promise, but merely circumstances showing that both parties contemplated that a breach must affect the property of one or the other. Clearly mere financial loss is not sufficient, as, for example, in *Quirk v. Thomas*, *supra*, where the plaintiff gave up her business position, nor, as the court points out in that case, is the purchase of a trousseau such special damage.

As stated above, the action is permitted to survive in the states of North Carolina, Louisiana, and Iowa, a view due partly to peculiar statutes and a liberal interpretation of them. The North Carolina court in construing the statute dealing with the survival of actions allowed this form of action to survive,<sup>8</sup> but in a later case<sup>9</sup> this decision, though recognized as a binding authority, was disapproved, the court favoring the abatement of the action unless special damage were shown. In Louisiana, the right of action for breach of promise is said to assume an "independent status" which is heritable and may be enforced against the deceased's estate.<sup>10</sup> By statute in Iowa, "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same."<sup>11</sup>

In no case in the American or English reports has the requisite special damage been alleged and proved, and the action permitted to survive, and all the opinions as to the necessary special damage must therefore be considered *dicta*. In *Frazer v. Boss*,<sup>12</sup> where the woman had transferred to the deceased promisor the goods, furniture, and fixtures in her store in consideration of his promise of marriage, and he had later refused to marry her, and kept the goods or the proceeds thereof, action was brought to recover as for goods sold and delivered. It was held to survive as a quasi-contractual obligation against his executor, but not as a breach of promise action, and the court, though intimating that this might be such special damage as would cause a breach of promise action to survive, declined to base its decision on that ground.

In this state of the law, the question as to what constitutes "special damage" may still be considered an open one.

Malcolm B. Carroll, '18.

*Evidence: Presumption of Death from Absence: Amount of Preliminary Proof Necessary to Raise the Presumption: Presumption One of Law or Fact.*—Whether diligent inquiry is necessary before the presumption of death arises is the question involved in *Page v. Modern Woodmen of America*, 156 N. W. (Wis.) 137 (1916). In 1901 the defendant order issued a benefit certificate upon the life of the plaintiff's husband, Arthur E. Page, which was payable upon his death. After becoming so insured, Page did nothing inconsistent with the provisions of the policy. In March, 1905, after engaging in

<sup>8</sup>*Shuler v. Millsaps*, 71 N. C. 297 (1874).

<sup>9</sup>*Allen v. Baker*, 86 N. C. 91 (1882).

<sup>10</sup>*Johnson v. Levy*, 118 La. 447 (1907) and 122 La. 118 (1908).

<sup>11</sup>Annotated Code of the State of Iowa, sec. 3443.

<sup>12</sup>66 Ind. 1, 13 (1879).

a timber enterprise, he disappeared, never communicating thereafter with his wife nor returning to his home at Frederic, Wisconsin, although he was on pleasant terms with the former and devoted to his children. However, there were some financial obligations, several of which were maturing about the time of his disappearance. The plaintiff, after inquiring among relatives and friends as to his whereabouts and advertising in Woodmen papers when assessments became due, gave up further inquiry, thereafter paying his dues as they arose until November, 1912. Eighteen months after Page's disappearance, word was received from his brother at St. Louis, that Page had been there during the summer of 1905, departing ostensibly to go to Galveston, Texas.

The court, following the precedent of an earlier Wisconsin case,<sup>1</sup> which decided that proof of diligent search and inquiry was not necessary before the presumption of death could be raised, held that sufficient evidence was presented to establish a legal presumption of his death, entitling plaintiff to a directed verdict.

According to the more modern rule,<sup>2</sup> however, in order to raise the presumption of death there must not only be evidence of the absence from home or place of residence for a period of seven years, but there must be a lack of information regarding the absent one on the part of those with whom he would naturally communicate, after diligent inquiry. Thus the court in *Modern Woodmen of America v. Gerdon*<sup>3</sup>, said, "Facts which are sufficient to put an interested party upon inquiry will constitute information regarding the existence of the absent one, unless duly tested; and, until reasonable effort has been expended to exhaust all patent sources of information, and all others which the circumstances of the case may suggest, it cannot truthfully be asserted that diligent inquiry has been made." It is pointed out that because of the breadth of this country and the migratory nature of its people, the presumption has less force here than in England where it originated and that the assumption is often contrary to the truth and, therefore, should not be permitted to be too easily or too readily established. With modern publicity and facility of communication, no acceptable excuse can be offered for ignorance of any one's whereabouts until all available sources of information have been exhausted. In the principal case, there was a failure to investigate and inquire at Galveston, Texas, where Page was said to have gone. It, therefore, could not be sustained under the more modern rule, for to quote again from the *Gerdon* case:<sup>4</sup> "Any word received by anyone who might naturally be expected to hear at any time within the

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<sup>1</sup>Miller v. Sovereign Camp, 140 Wis. 505 (1909).

<sup>2</sup>Hansen v. Owens, 132 Ga. 648 (1909); Kennedy v. Modern Woodmen of America, 243 Ill. 560 (1910); Modern Woodmen of America v. Gerdon, 72 Kan. 391 (1905); Wentworth v. Wentworth, 71 Me. 72 (1880); Shriver v. State, 65 Md. 278 (1896); Stockbridge's Case, 145 Mass. 517 (1887); Bailey v. Bailey, 36 Mich. 181 (1877); U. of N. C. v. Harrison, 90 N. C. 385 (1884); Dietrich v. Dietrich, 128 App. Div. (N. Y.) 564 (1908); Morrison's Estate, 183 Pa. 155 (1897).

<sup>3</sup>Modern Woodmen of America v. Gerdon, *supra*, note 2.

<sup>4</sup>Modern Woodmen of America v. Gerdon, *supra*, note 2.

seven year period destroys the presumption of death, and unless the resources of this field of information have been exhausted, an allegation of death cannot be sustained."

Historically,<sup>5</sup> the presumption of death from an absence of seven years without being heard from, developed from the presumption of continuance of life, or, that a person once known to be alive was presumed to continue to live until the contrary was proven. In England, by analogy to the statute exempting from bigamy those marrying the second time after seven years' absence of the first spouse, and that concerning leases determinable upon lives, judges began to rule that the presumption of life ceased at the end of seven years from the time when he was last heard of. Gradually they expressed this cessation as an affirmative presumption of death, so that it has now become a rule of law requiring that death be assumed under the given circumstances. In New York<sup>6</sup> the presumption has developed in a similar manner, by analogy to the statute relating to the presumption of death of persons upon whose lives estates in land depend.

It is to be noted, however, that while there is a definitely established presumption that one is dead at the end of the seven year period, there is no presumption as to the precise time of the death,<sup>7</sup> and the burden of proving the particular period in which it occurred lies upon the party to whose cause or title that fact is essential.<sup>8</sup> Where the absence is explicable upon some ground other than an assumption of death, the presumption should not be permitted to operate. Thus, where a man was a fugitive from justice, that fact was held sufficient to rebut the presumption.<sup>9</sup>

The statement that the presumption of death is now a "rule of law" invites a discussion of the proper sense and use of the word "presumption." The term has been misused and misapplied by courts and judges in the past so as to become ambiguous and cause confusion.<sup>10</sup> Indeed, Chamberlayne,<sup>11</sup> in the following terse comment, suggests its removal entirely: "The wish that the term could be finally dropped will interest any one who has had occasion to consider the matter with any care, and the more strongly by reason of the fact that it is entirely superfluous and principally used at the present time on account of its convenient obscurity."

Presumptions in their proper sense are arbitrary rules of law recognized by the courts, which are based upon the probative strength

<sup>5</sup>Thayer, *Prel. Treatise on Ev. at Common Law*, chap. 8.

<sup>6</sup>Mc Cartee v. Camel, 1 Barb. Ch. (N. Y.) 455 (1846).

<sup>7</sup>Adams v. Jones, 39 Ga. 479 (1869); Whiting v. Nicoll, 46 Ill. 230 (1867); Seeds v. Grand Lodge, 93 Iowa 175 (1894); Johnson v. Merithew, 80 Me. 111 (1888); Hancock v. Amer. Ins. Co., 62 Mo. 26 (1876); Davie v. Briggs, 97 U. S. 628 (1878); Nepean v. Doe, 2 M. & W. (Eng.) 894 (1837); *In re Phene's Trusts*, L. R. 5 Ch. 139 (1869).

<sup>8</sup>*In re Phene's Trusts*, *supra*, note 7.

<sup>9</sup>Mutual Benefit Ins. Co. v. Martin, 108 Ky. 11 (1900).

<sup>10</sup>4 Wigmore, *Evidence*, sec. 2491; 2 Chamberlayne, *Evidence*, sec. 1026; Bell v. Town of Clarion, 113 Iowa 126 (1901); Lisbon v. Lyman, 49 N. H., 553, 563 (1870).

<sup>11</sup>2 Chamberlayne, *Evidence*, sec. 1026.

of the evidentiary fact and operate without regard to the real truth, by assuming the truth of certain matters in a given inquiry.<sup>12</sup> They rest upon the basis of general experience, probability of any kind, policy or convenience. Thus, it has been said that the presumption of death is "an arbitrary one rendered necessary on grounds of public policy in order that rights depending on the life or death of persons long absent and unheard of might be settled by some certain rule."<sup>13</sup> It is from these assumptions that a large part of our substantive law has arisen. Inferences of fact have developed in course of time into presumptions of law, the latter often becoming indisputable and finally being elevated to the position of maxims of jurisprudence.<sup>14</sup>

One cannot, however, agree with the commonly accepted classification,<sup>15</sup> that presumptions are on the one hand, those of fact and on the other, those of law. The former are in truth not presumptions at all, no legal consequence being attached to them. Wigmore<sup>16</sup> says in part that "a presumption of fact in the usual sense, is merely an improper term for the rational potency, or probative value of the evidentiary fact, regarded as not having this necessary legal consequence. They have no significance so far as affects the duty of one or the other party to produce evidence because there is no rule of law attached to them, and the jury may give to them whatever force or weight it thinks best—just as it may to other evidence." For example, where smoke can be seen coming from a chimney, one *may* reasonably infer the existence of a fire, and similarly where a ship founders, without apparent cause soon after leaving port, one *may* infer that she was unseaworthy at departure.<sup>17</sup> These are merely *inferences* whose basis rests in logic, in inductive reasoning, whose source is probability,<sup>18</sup> and they should be so designated. The conclusion to be drawn from them lies solely within the province of the jury and disregarding such an inference, no matter how strong, will result in a new trial only in the court's discretion.<sup>19</sup>

Presumptions of law, then, are the only true presumptions and the only sense in which that term should be used. A presumption of law is a "rule of law announcing a definite probative weight attached by jurisprudence to a proposition of logic. It is an assumption made by the law that a strong inference of fact is *prima facie* correct and will therefore sustain the burden of evidence until conflicting facts on the point are shown. When such evidence is introduced the assumption of law is *functus officio* and drops out of sight. The inference of fact

<sup>12</sup>Thayer, Pre. Treatise on Ev. at Common Law, Chap. 8; 6 Law Mag. 348 (Oct. 1831); Ward v. Met. Life Ins. Co., 66 Conn. 227, 238 (1895).

<sup>13</sup>Jones, Evidence, sec. 61.

<sup>14</sup>Ward v. Met. Life Ins. Co., *supra*, note 9.

<sup>15</sup>16 Cyc. 1050; Levins v. Rovigno, 71 Cal. 273 (1886); Roberts v. People, 9 Col. 458, 474 (1886); United States v. Searcey, 26 Fed. Rep. 435 (1885).

<sup>16</sup>United States v. Sykes, 58 Fed. Rep. 1000, (1893); Justice v. Lang, 52 N. Y. 323, 327 (1873).

<sup>17</sup>Wigmore, Evidence, sec. 2491.

<sup>18</sup>Justice v. Lang, *supra*, note 12.

<sup>19</sup>Liverpool L. & G. Ins. Co. v. So. Pacific Co., 125 Cal. 434 (1899); Dietrich v. Dietrich, 128 App. Div. (N. Y.) 564 (1908).

<sup>20</sup>Sun. Mutual Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 502 (1882).

which has been assumed to be correct continues to have its logical weight in the case."<sup>20</sup> The legal effect of these real presumptions is to put the burden of going forward with evidence on the party against whom they operate. They are not in themselves evidence,<sup>21</sup> although some courts have given them probative force in addition to the probative value of the facts of which they are composed<sup>22</sup>, nor do they belong to the law of evidence but rather to the substantive law with which they are connected.<sup>23</sup> These presumptions have been divided generally into two classes, namely: (1) disputable presumptions, and (2) conclusive presumptions. If the disputable presumption is not contradicted, it becomes a rule of law indisputable for the case and must be regarded by the jury.<sup>24</sup> Where it is disregarded, a new trial will be granted *ex debita justitiæ*.<sup>25</sup> The so-called conclusive presumptions of law are absolute rules governing the disposition of the case whose truth or falsity cannot be investigated. That the term "conclusive presumption" is a misnomer since *ex vi termini* a presumption is rebuttable is stated by many authors.<sup>26</sup> It is a term which should be dispensed with. It is to be hoped that at some future day, the authorities will agree upon some uniform terminology which shall eliminate the confusion prevalent in this subject.

Leonard G. Aierstok, '17.

*Libel: Refusal of Equity to Enjoin.*—Some of the most common of our legal doctrines seem to be applied by the courts on the same principle that the rain is sent on the just and on the unjust. The law sheds its blessings with impartiality, but also, frequently, with injustice. This is because ethics and the law are not, and never have been, equivalent. Ethics are the standards to which a man *ought* to conform; law is the standard to which he *must* conform. As long as men regard any suggested custom as theoretically fair and just, but impracticable, we have an ethical rule; but when the majority begin to observe this custom as a practical guide in intercourse between man and man, and to punish those who ignore it, then we have a law. All ethics eventually become law, sometimes because an independent judge overrides established custom, and sometimes because the

<sup>20</sup>16 Cyc 1050; for other definitions, see 6 Law Mag. 348 (Oct. 1831); 1 Greenleaf, Evidence, sec. 44; Jones, Evidence, sec. 11; 22 Amer. & Eng. Ency. of Law, 1234; 9 Ency. of Evidence 879; Levins v. Rovegno, *supra*, note 12; Doane v. Glenn, 1 Col. 495 (1872); United States v. Searcey, *supra*, note 12; United States v. Sykes, *supra*, note 12; Lisbon v. Lyman, *supra*, note 7; State v. Hodge, 50 N. H. 510, 521 (1869); Justice v. Lang, *supra*, note 12; Commonwealth v. Frew, 3 Pa. Co. Ct. Rep. 492, 496 (1887); Tanner v. Hughes, 50 Pa. St. 289, 291 (1866).

<sup>21</sup>Thayer, Prel. Treatise on Ev. at Common Law, chap. 8; 9 Ency. of Ev. 886, 887; State v. Jones, 64 Iowa 349, 362 (1884); Lisbon v. Lyman, *supra*, note 7. <sup>22</sup>Sturdevant's Appeal, 71 Conn. 392 (1899); Graves v. Colwell, 90 Ill. 612 (1878).

<sup>23</sup>Thayer, Prel. Treatise on Ev. at Common Law, chap. 8.

<sup>24</sup>Thayer, Prel. Treatise, *supra*, note 20; Kidder v. Stevens, 60 Cal. 414 (1882); United States v. Sykes, *supra*, note 12; Biegler Case, 57 Mo. App. 419 (1894); Youngs v. Heffner, 36 Oh. St. 232 (1880); Tanner v. Hughes, 53 Pa. St. 289, 291 (1866).

<sup>25</sup>Sun Mut. Ins. Co. v. Ocean Ins. Co. 107 U. S. 485, 502 (1882).

<sup>26</sup>4 Wigmore, Evidence, sec. 2492; 16 Cyc. 1080; 9 Ency. of Evidence 884.

cumulation of public necessity sweeps aside the conservatism of the courts; but "the mills of the gods grind slowly, though they grind exceeding fine."

The refusal of courts of equity to grant injunctions restraining libels is one instance in which the law has for centuries been retarded in its advance toward ethical perfection. A may lay a pipe over a piece of practically worthless land belonging to B, and upon B's application equity will restrain A because of the irreparable injury to the property rights of B, and also to save B the necessity of many successive suits at law. But A may spread a malicious falsehood about B, injuring him irretrievably in the eyes of his family, his friends, and the world, and may declare his intent to repeat this falsehood and to invent new ones, yet equity will take no jurisdiction, for by a senile doctrine evolved centuries ago, rights of personality will not be protected by equity, because money damages are considered to afford a complete and satisfactory remedy for any injury, however destructive, to reputation and feelings. One is reminded of "that chink in the common law which has been worn smooth by the multitude of scoundrels who have escaped through it", and is inclined to fear that equity has its similar crannies.

Two recent cases have perpetuated this survival of the Middle Ages. In *Howell v. The Bee Publishing Co.* 158 N. W. (Neb.) 358 (1916), the plaintiff had in June, 1914, written a letter refusing to become a gubernatorial candidate at the August primaries. He later amended his purpose and sought the nomination. On August 17, the day before the primaries, the defendant newspaper published his June letter under the headline, "Howell will not run." Plaintiff sought to enjoin further publication. The Nebraska state constitution provides, in part, "Every person may speak, write, or publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense."<sup>1</sup> The District Court granted the injunction. With the statement that equity would not enjoin a libel, the Supreme Court reversed this decree, apparently believing that the reason for this rule is found in the jealous guard kept over the freedom of the press, and that the constitutional provision above quoted strengthened this reason.

In the second case, *Willis v. O'Connell*, 231 Fed. (Southern Dist., Ala.) 1004 (1916), plaintiff was agent for a certain patent medicine, of which five hundred thousand bottles were sold in one year in the six southern states that he covered. Defendant published some rather pungent statements, alleged to be libellous, concerning the popularity of this remedy in the prohibition state of Alabama, and referring specifically to its use by certain of those who had sent "testimonials" to the maker of the medicine. The Alabama constitution contains a provision regarding libels, similar to that in Nebraska.<sup>2</sup> Plaintiff alleged not only harm to his personal feelings and reputation,

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<sup>1</sup>Constitution, Nebraska, Art. I, sec. 5.

<sup>2</sup>Constitution, Alabama (1901), Art. I, sec. 4.

but also injury to his business through probable intimidation of those whom he might reasonably expect to write testimonials in the future. The court denied an injunction to restrain publication. The opinion contains a review of the authorities, and sets forth another view as to the reason for the rule that equity will not enjoin a libel, namely, that to do so would be to protect interests of personality, over which equity has no jurisdiction.

It seems that both of these cases are correct on authority, but not upon principle. The leading case on the subject of injunction of libel is *Gee v. Pritchard*,<sup>3</sup> an English case decided in 1818. Defendant was an adopted son, and as a member of the family, plaintiff, his foster mother, had written certain personal letters to him. Defendant now threatened to publish these. Lord Eldon said that the case could not be maintained on the ground of protecting plaintiff's feelings or securing any other interest of personality, and that relief could only be given to protect rights in property. But he held that plaintiff had a "sufficient property in the original letters to authorize an injunction."

Let us look a little more closely at Lord Eldon's logic. Equity normally assumes jurisdiction because there is no adequate remedy at law. Now, in this case what wrong could not be redressed at law? The court says that it is the violation of the *property* right in the letters, but in the light of common sense, to whom were these letters, having no literary value, so precious that their worth as *tangible property* could not be estimated and paid in money? Obviously, to no one. But just as obviously, they were exceedingly valuable to the plaintiff for their *personal intangible associations*, or for their effect upon her *reputation*, and it was this value that could not be estimated and paid in a suit at law; that is, while *declaring* that the property right was the only one recognized, the court *protected* and *compensated* the interest of personality.

Dean Roscoe Pound of the Harvard Law School, in an exhaustive article upon this subject, suggests that the reason for the conservative wording of Eldon's opinion is that it was given at a comparatively early date in the development of equity.<sup>4</sup> The jurisdiction of equity over torts was but little extended, and the right of privacy as a legal doctrine had not been dreamed of. We now know that the field of equity was greatly broadened during the middle of the nineteenth century, and hence we might expect that the control of equity over libels would expand commensurately, particularly as some *dicta* had already gone farther than did the opinion in this case.<sup>5</sup> And indeed, in England, after a lapse of some fifty years, such development did take place. The American cases generally attribute this extension of equitable powers to the effect of two English statutes,<sup>6</sup> but an

<sup>3</sup>2 Swanst. 402 (1818).

<sup>4</sup>29 Harv. L. R. 640.

<sup>5</sup>See especially *DuBost v. Beresford*, 2 Camp. 511 (1810). *Burnet v. Chetwood*, 2 Meriv. 441 (1720), and *Huggonson's Case*, 2 Atk. 469 (1740), also contain *dicta*, but the first is clearly too broad, and the latter seems narrow and not to the point.

<sup>6</sup>Common Law Procedure Act (1854), 17 and 18 Vict., c. 125; Judicature Act (1873), 36 and 37 Vict., c. 66.

examination of these laws fails to disclose any very definite authority for equitable control of libels. If the broadened decisions of the English courts are placed upon these statutes, it is because the Chancellors availed themselves of the barest excuse to reverse an antiquated doctrine.<sup>7</sup>

But the line of American decisions has been very different. Not only have no courts taken a broad and just viewpoint, but many have "gilded the lily", and have narrowed even the letter of Lord Eldon's refined reasoning.

Before tracing the extension of the doctrine in America, we should have clearly in mind the exact limitations of our question. The reader will remember that the apparent doctrine of *Gee v. Pritchard*, *supra*, was that equity could not protect the plaintiff's feelings or secure any other interest of personality from a libel, but that relief could be given to protect property rights. In the first place, we must understand just what is considered a "libel"; then, must define "interest of personality"; and lastly, must know the meaning of "property" as equity will protect it from libel.

*First:* The layman's usual idea of a libel is that it is a malicious and vicious written attack upon the character of a person. But as covered by these cases, it seems also to include attacks on a man's business reputation, or upon his financial standing, upon his title to property or its condition or quality, or publication regarding his private affairs. Some of these may not, technically, be libels, but as regards the power of equity to enjoin them, they may all be classed together under the one term.

*Second:* The term "interest of personality" includes any right that pertains to the enjoyment or security of human life, and not to the ownership of substance.<sup>8</sup> We shall see specific examples *infra*.

*Third:* "Property" naturally covers such things as may be bought and sold; and most if not all jurisdictions now include the right to privacy, and a man's business standing.<sup>9</sup> An attack on any of these is an attack on a property right.

To return now to the American adjudications. The first case arose in New York, and in view of the intense conservatism of that

<sup>7</sup>A short summary of the English development, as outlined in the article in 29 H. L. R. 640, may not be out of place. The next case after *Gee v. Pritchard*, *supra*, note (3), was *Dixon v. Holden*, 7 Eq. 488 (1869). The court seems to have ruled that equity would protect an interest of personality as well as a property right. *Prudential Assur. Co. v. Knott*, 10 Ch. App. 142 (1874), overrules this as to injunction of a libel. Next, after the passage of the Judicature Act, *supra* note (6), *Saxby v. Easterbrook*, 3 C. P. D. 339 (1878), established the rule that injunction would be allowed if the libel was repeated after a jury had found it libellous. The next step was to allow injunction without first going to law, if the matter was clearly libellous, *Liverpool Ass'n v. Smith*, 37 Ch. Div. 170 (1887); and now the courts will give an injunction against a clearly proven libel, exactly as in the case of any other tort, *Walter v. Ashton* (1902) 2 Ch. 262, and cases there cited.

<sup>8</sup>See 37 L. R. A. 783, a valuable and oft-quoted note.

<sup>9</sup>*Dixon v. Holden*, *supra*, note 7, gave the original definition of property. It has been overruled on other points, but still seems good as to the definition. But *Donaldson v. Wright*, 7 App. D. C. 45 (1895), and *Edison v. Edison Chem. Co.*, 128 Fed. 957 (1904), hold that business reputation is not property.



day, it is not surprising to find the court adhering closely to precedent. The defendant in the suit, in revenge for discharge from plaintiff's employ, threatened to publish a fictitious and libellous "life" of the plaintiff. Injunction of this publication was refused, on the ground that freedom of the press was endangered.<sup>10</sup>

It is clear of course that in this case the court has not even the thin excuse of Lord Eldon to issue an injunction, for there is not the shadow of a property claim here. But the court suggests that even a property right might not be protected. Without expressly disapproving the decision in *Gee v. Pritchard*, the Chancellor "doubted whether his lordship in that case did not to some extent endanger the freedom of the press by assuming jurisdiction of the case as a matter of property merely, when in fact the object of complainant's bill was \* \* \* \* to restrain the publication of a private correspondence, as a matter of feeling only." It seems from this that the American court did not see a clear distinction between property and personality as subjects of equitable jurisdiction. It was explicitly recognized that Eldon was protecting a personal interest; and the court's objection was, not to the jurisdiction of equity over interests of personality, but to the infringement of another carefully treasured right.

The old English distinction does not in fact seem valid. Not only is the publication of private letters, having no literary value, enjoined,<sup>11</sup> but equity also forbids the continuance of a nuisance injurious to personal health or comfort,<sup>12</sup> and the publication of portraits,<sup>13</sup> and the disturbance of dead bodies.<sup>14</sup> In an extreme case, such as the maintenance of a powder mill<sup>15</sup> or of a rifle range<sup>16</sup> in the neighborhood, there may be a real diminution of property value, but in these other cases personal rights are the only ones in question. Upon the strength of these decisions there have been strong protests against a continuance of the attempted distinction,<sup>17</sup> and recently several well-argued cases have expressly declared the right of equity to protect interests of personality.<sup>18</sup> Few of the American refusals to

<sup>10</sup>*Brandreth v. Lance*, 8 Paige (N. Y.) 24 (1839).

<sup>11</sup>Originally the publication of private letters was enjoined only if they had a literary value. *Wetmore v. Scovell*, 3 Edw. Ch. (N. Y.) 515 (1842); *Hoyt v. Mackenzie*, 3 Barb. Ch. (N. Y.) 320 (1848). But for the extension of the doctrine to all private letters, see among others *Folsom v. March*, 2 Story (U. S.) 100 (1841); *Grigsby v. Breckenridge*, 2 Bush (Ky.) 480 (1867); *Woolsey v. Judd*, 4 Duer (N. Y.) 379 (1855); 25 Cyc. 1491.

<sup>12</sup>Injunction against the discharge of sewage, *Butler v. Thomasville*, 74 Ga. 570 (1885); or against the use of an unhealthy jail, *Stuart v. Lasalle Co. Supers.*, 83 Ill. 341 (1876); or against noise which disturbs a sick person, *Dennis v. Eckhardt*, 3 Grant Cas. (Pa.) 390 (1862).

<sup>13</sup>*Corliss v. Walker*, 64 Fed. 280 (1894) *semble*; *Pavesich v. New Eng. L. Ins. Co.*, 122 Ga. 190 (1904); *Itzkovitch v. Whitaker*, 115 La. 479 (1905); *Munden v. Harris*, 153 Mo. App. 652 (1911); *Marks v. Jaffa*, 6 Misc. (N. Y.) 290 (1893).

<sup>14</sup>This point is so well settled that it seems hardly necessary to cite cases. See 13 Cyc. 269, note 8; also *Pierce v. Swan Point Cemetery*, 10 R. I. 227 (1872).

<sup>15</sup>*Daw v. Mfg. Co.*, 160 Pa. 479 (1894).

<sup>16</sup>*McKillop v. Taylor*, 25 N. J. Eq. 139 (1874).

<sup>17</sup>37 L. R. A. 783; 16 Cyc. 120.

<sup>18</sup>*Vanderbilt v. Mitchell*, 72 N. J. Eq. 910 (1907); *Ex parte Warfield*, 40 Tex. Crim. 413 (1899).

enjoin a libel have been based explicitly upon this English distinction,<sup>19</sup> and in view of the modern cases last noted, it seems doubtful if they will be much further extended.

We may ask, then, whether the New York view has been generally accepted. The majority of cases which have given any reason in support of the rule under discussion, have undoubtedly advanced the "freedom of the press" argument.<sup>20</sup> A few have objected to the fact that defendant would be deprived of what they consider his constitutional right to a jury trial,<sup>21</sup> but probably the majority of cases in which injunction has been refused have been based solely upon authority.<sup>22</sup>

The fact is that there are so many exceptions to the rule that a reason consistent with all the cases cannot be formulated. For if care for the freedom of the press is the real basis of the refusal to enjoin a libel, it is just as seriously endangered when a property right is protected as when a mere interest of personality is concerned. Yet Massachusetts seems to be the only jurisdiction which has consistently refused to enjoin a libel when a property interest was injured.<sup>23</sup>

To note the most general exceptions (though none of these are universally accepted, we must remember), when one sends out circulars to a patentee's customers, stating that he intends to prosecute for violation of his own patent rights any who may deal with the patentee, when as a matter of fact he knows that he has no such right and no intent to prosecute, and issues the notices only for the purpose of intimidation, equity will enjoin the issue of such circulars.<sup>24</sup>

<sup>19</sup>The following seem to rest principally on this distinction: *Donaldson v. Wright*, *supra*, note 9; *Singer Co. v. Domestic Co.*, 49 Ga. 70 (1872); *Chappel v. Stewart*, 82 Md. 323 (1896); see also *Citizens Co. v. Montgomery Co.*, 171 Fed. 553 (1909) *semble*; *Vassar College v. Loose Wiles Co.*, 197 Fed. 982 (1912).

<sup>20</sup>*Montgomery, Ward Co. v. South Dakota Ass'n*, 150 Fed. 413 (1907); *Liversy v. Judge*, 34 La. Ann. 741 (1882); *Marx Co. v. Watson*, 168 Mo. 133 (1902); *Life Ass'n v. Boogher*, 3 Mo. App. 173 (1876); *Lindsay & Co. v. Montana Federation*, 37 Mont. 264 (1908); *Iverson v. Dilno*, 44 Mont. 270 (1911); *Marlin Fire Arms Co. v. Shields*, 171 N. Y. 384 (1902); *N. Y. Juv. Soc. v. Roosevelt*, 7 Daly (N. Y.) 188 (1877); *Mitchel v. Grand Lodge*, 121 S. W. (Tex.) 178 (1909).

<sup>21</sup>*Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492 (1892); *Baltimore L. Ins. Co. v. Gleisner*, 202 Pa. St. 386 (1902) *semble*.

<sup>22</sup>*Francis v. Flinn*, 118 U. S. 385 (1886); *Kidd v. Horry*, 28 Fed. 773 (1886); *Balliet v. Cassidy*, 104 Fed. 704 (1904); *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. 95 (1886); *Christian Hospital v. Murphy*, 223 Ill. 244 (1906); *Chic. Ry. Co. v. General Elec. Co.*, 74 Ill. App. 465 (1897); *DeWick v. Dobson*, 18 App. Div. (N. Y.) 399 (1897).

<sup>23</sup>*Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (1873); *Whitehead v. Kitson*, 119 Mass. 484 (1876); *Raymond v. Russell*, 143 Mass. 295 (1887); *Covel v. Chadwick*, 153 Mass. 263 (1888); *Finnish Temperance Soc. v. Raivaaja Publ. Co.*, 219 Mass. 28 (1914).

There are various other cases which go to this Massachusetts extreme, but they are not consistently followed in their jurisdictions. See *Francis v. Flinn*, *supra*, note 22; *Kidd v. Horry*, *supra*, note 22; *Balliet v. Cassidy*, *supra*, note 22; *Marx Co. v. Watson*, *supra*, note 20; *Lindsay & Co. v. Montana Fed.*, *supra*, note 20; *Mauger v. Dick*, 55 How. Pr. (N. Y.) 132 (1878); *DeWick v. Dobson*, *supra*, note 22; *Mitchell v. Grand Lodge*, *supra*, note 20.

<sup>24</sup>*Emack v. Kane*, 34 Fed. 46 (1888); *Lewin v. Welsbach Light Co.*, 81 Fed. 904 (1897); *Farquhar Co. v. Nat'l Harrow Co.*, 102 Fed. 714 (1900); *Dittgen v. Racine Co.*, 164 Fed. 85 (1908); *Electric Mfg. Co. v. Vacuum Cleaner Co.*, 189 Fed. 754 (1911); *Atlas Co. v. Cooper Co.*, 210 Fed. 347 (1913).

So, too, where labor unions print statements or post placards to intimidate customers or employees of their opponents, an injunction will be granted.<sup>25</sup> Or where the libel tends to incite a breach of trust or contract,<sup>26</sup> or to interfere with the course of justice,<sup>27</sup> or where in a jury trial a publication has been declared to be, and has been punished as, a libel, and afterwards it is continued by the defendant,<sup>28</sup> equity will enjoin the publication. Some jurisdictions have gone even further, and enjoin the use against his desire of a party's name,<sup>29</sup> or publication contrary to military interests,<sup>30</sup> or defamation of a man's business.<sup>31</sup>

In view of the fact that this multitude of exceptions is constantly increasing, it seems that the skeleton of the rule that still remains is nearing its last resting place. Its life is lengthened because of the unreasoning acceptance of authority by many courts. We have already seen the three arguments usually advanced in support of the rule, that equity cannot protect interests of personality, that the constitutional guarantee of freedom of the press prevents injunction of libels, and that the constitutional right to a jury trial raises the same objection. We have also noted the many evasions of the rule. The very fact that there are so many exceptions shows plainly the decay of the doctrine, but were there no exceptions at all, it would be no more reasonable.

Why, for instance, cannot equity protect interests of personality? We have seen that as a matter of fact it does. The usual argument, that money damages at law offer adequate compensation for injury to reputation and personal comfort, can hardly be dignified with the name of "fallacy," for there is not even a gloss of apparent reason to protect it. The true foundation of the rule seems to be laid in conditions that prevailed some centuries ago. Men had little reputation then, except as to their ability to handle a bow or a battle-axe, and defamation of such reputation was avenged on the body of the libellor. The rights contested in the courts were in regard to property and naturally property interests seemed to the judges to be of paramount importance. So when equity began the struggle for power, the chancellors grasped at jurisdiction over property rights, and left untouched the broad field of interests of personality. Juris-

<sup>25</sup>*Gompers v. Bucks Stove Co.*, 221 U. S. 418 (1911); *Casey v. Cincinnati Typo. Union*, 45 Fed. 135 (1891); *Seattle Brewing Co. v. Hansen*, 144 Fed. 1011 (1905); *American Fed. of Labor v. Buck Stove Co.*, 33 App. D. C. 83 (1909); *Beck v. Teamster's Union*, 118 Mich. 497 (1898).

<sup>26</sup>*Citizen's Co. v. Montgomery Co.*, *supra*, note 19; *Nat'l L. Ins. Co. v. Myers*, 140 Ill. App. 392 (1908); *Mauger v. Dick*, *supra*, note 23. Even Massachusetts, by *dictum*, recognizes this exception, *Boston Diatite Co. v. Florence Mfg. Co.*, note 23, *supra*.

<sup>27</sup>*Hobbs Mfg. Co. v. Gooding*, 113 Fed. 615 (1902) *semble*. But *contra*, *Dailey v. Super. Court*, 112 Cal. 94 (1896).

<sup>28</sup>*Flint v. Hutchinson Smoke Burner Co.*, *supra*, note 21; *Baltimore L. Ins. Co. v. Gleisner*, *supra*, note 21.

<sup>29</sup>*Vanderbilt v. Mitchell*, *supra*, note 18; *Edison v. Edison Poly. Co.*, 73 N. J. Eq. 136 (1907).

<sup>30</sup>*Ex parte Vallandigham*, 1 Wall. (U. S.) 243 (1863).

<sup>31</sup>*Hovey v. Rubber Tip Pencil Co.*, 57 N. Y. 119 (1874), *dicta*, page 124.

diction over personal interests is comparatively an innovation, and even in the most liberal courts is not yet fully developed, while the conservative are still content to administer the law of the Dark Ages. As one writer suggests, chancery jurisdiction grew out of the faults of the civil, and not of the criminal law, and the restriction should be to civil, and not merely to property, rights.<sup>32</sup>

Is there any greater virtue in the theory that injunction of libels would deprive the publisher of his constitutional right to have a jury decide upon the legality of his act? An illustration given in a Missouri case<sup>33</sup> answers this question. Suppose that A rushes at B waving a revolver, and loudly declaring his intent to kill B. Suppose, too, that C seizes A, and restrains any attack upon B. Now, if A's purpose had been carried out, he would have had the right to answer for B's death before a jury, and perhaps could have justified the homicide. Has not C, then, deprived A of his constitutional right to a jury trial? This simply shows the absurd extreme to which the arguments can be carried; and the same illustration, substituting an intent to libel for the intent to kill, and a court of equity for C, applies to the doctrine that equity ought not to restrain a libel.

The last and most generally accepted reason is that equity ought not to restrain a libel in advance of publication because of the constitutional guarantee of freedom of the press. This rule was laid down in the original New York case without any examination into its validity, and the courts since then, while continually finding exceptions, have not inquired into the soundness of the doctrine. In the days of the Stuarts and the early Hanovers the freedom of the press was with good reason jealously guarded. But to-day the spirit of government is wholly different, and the natural and logical view seems to be the one advanced by Story,<sup>34</sup> that the Constitution was intended to guarantee only liberty to publish the truth with good motives and for justifiable ends. It is obvious that, if we are to avoid anarchy, there must be some check upon the press, at the least in the form of liability to punishment *after* a libellous or treasonable publication; and since we must go so far, why not have a really reasonable and effective restraint, and let the courts enjoin a wrong before it becomes an accomplished fact?

Dean Pound in his article above referred to,<sup>34</sup> criticizes the prevailing doctrine, that equity will not enjoin a libel, and suggests four rules the observance of which would preclude any undue exercise of censorship by the courts. There should be (1) a legal cause of action for defamation or disparagement of property, (2) a case for equity because of the inadequacy of the legal remedy, (3) so clear a libel that there is no substantial call for a jury trial, and (4) the entire proceeding subject to review upon appeal. Under these rules the chance for injustice would be reduced to a minimum, and there would seem to be far less chance for abuse than under the present "liberal" doctrine.

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<sup>32</sup>16 Cyc. 121.

<sup>33</sup>Shoe Co. v. Saxey, 131 Mo. 212 (1895).

<sup>34</sup>2 Story, Constitution, sec. 1880.

Perhaps no better summary of the attitude of equity, and criticism thereof, could be made than to quote two extracts from Dean Pound's discussion. Of the present attitude says he, "The old doctrine is announced with conviction. But the whole spirit is rejected and in result it is evaded. Something is found which gives the camel's nose legitimate standing in the chancellor's tent, and the whole beast follows to dispose of the case completely. Such devices never obtain except when we are dealing with a moribund rule." And in criticism, "Reading the American cases upon this point, one may recall the words of Mr. Justice Holmes upon the subject of trespass *ab initio*: 'It is revolting to have no better reason for a rule than that it was laid down in the reign of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists in blind imitation of the past.'"

"*Ratio est legis anima: mutata legis ratione mutatur et lex.*" But America seems to prefer "*Stare decisis.*"

Kenneth Dayton, '17.

*Real Property: Does Dowress Forfeit Her Rights Because She Killed Her Husband?*—On September 19, 1913, Mrs. Emma Eversole shot and killed her husband, Mack, seemingly as a result of his intimacy with his divorced wife. She was given an indeterminate sentence for manslaughter, and while in prison applied for dower in her victim's real estate. The Kentucky court in *Eversole v. Eversole*, 185 S. W. (Ky.) 487 (1916), allowed her claim. The Kentucky decedent state laws make no provision for forfeiture of dower when a wife kills her husband, and the Kentucky criminal laws do not provide for the forfeiture of the right to inherit from the victim as part of the punishment for murder. The court in coming to its decision held that these statutes plainly laid down the policy of the state in regard to murderous wives, and refused to change this policy to suit its own ideas of right.

The question raised by the case is, shall a slayer be permitted to make a pecuniary profit by his victim's death? This question has been widely discussed in various legal periodicals.<sup>1</sup> The cases on this point are hopelessly in conflict. The majority of American cases reach the result of the principal case upon similar reasoning.<sup>2</sup> The British courts,<sup>3</sup> and some few American courts,<sup>4</sup> however, take a contrary view. The omission of the statutes of descent and of the

<sup>1</sup>See 11 Columbia L. R. 180; 15 id. 260; 27 Harvard L. R. 280; 9 Ill. L. R. 502; 62 Pa. L. R. 484; 63 id. 435; 30 L. Q. R. 211.

<sup>2</sup>Wall v. Pfanschmidt, 265 Ill. 180 (1914); McAllister v. Fair, 72 Kan. 533 (1906); Gollnik v. Mengel, 112 Minn. 349 (1910); Shellenburger v. Ransom, 41 Neb. 631 (1894); Owens v. Owens, 100 N. C. 240 (1888); Deem v. Millikin, 53 Oh. St. 668 (1895); Holloway v. McCormick, 41 Okl. 1 (1913); DeGraffenreid v. Iowa Co., 20 Okl. 687 (1907); Carpenter's Estate, 170 Pa. St. 203 (1895); Johnson's Estate, 29 Pa. Super. Ct. 255 (1905).

<sup>3</sup>Estate of Crippen, (1911) Probate 108; Estate of Hall, (1914) Probate 1; Lundy v. Lundy, 24 Can. S. C. 650 (1895); In re Cash, 30 N. Z. L. 577 (1911).

<sup>4</sup>Perry v. Strawbridge, 209 Mo. 621 (1908); Riggs v. Palmer, 115 N. Y. 506 (1889); Matter of Wolf, 88 Misc. (N. Y.) 433 (1914).

criminal statutes to provide for this contingency is explained by a "rational interpretation"<sup>5</sup> to be either unintentional, through a failure to consider the contingency, or intentional but in reliance upon the common law maxim that a man may not profit by his own wrongdoing.<sup>6</sup> The underlying idea in these cases seems to be a vague impression that to allow the inheritance would be against public policy as rewarding the evil doer. Obviously, however, forfeiture of the profits of the crime benefits public policy only when the murder is committed with the intent to gain such profits. When such intent is absent, such forfeiture will have no deterring effect. Only when the murder is committed for gain will prospective loss of such gain dampen the criminal's ardor. It may be said that pecuniary gain is always a motive of some weight in crimes of this character, and that the criminal's true motives are indeterminable. In manslaughter cases, however, and in cases where the murderer immediately commits suicide, the possibility of the pecuniary motive is clearly eliminated. On principle, the advocates of the public policy theory should make a distinction between such cases and those in which pecuniary gain is either clearly or possibly a motive.<sup>7</sup>

It should be noted that in the principal case the pecuniary motive is seemingly absent. When the slaying is done with an eye to profit, the mind instinctively revolts at allowing the plan to succeed, and indeed the Supreme Judge has declared that the murderer who kills in order to gain an inheritance will not be allowed to retain it<sup>8</sup>. The weight of American authority is, however, *contra*.<sup>9</sup>

Cases in which the slayer profits by his crime may be classified as to the method by which he profits. This may be by descent, by testamentary gift, or by the proceeds of an insurance policy. So far as public policy is concerned, no logical distinction can be drawn between cases in which the victim died testate, and those in which he died intestate. Obviously, the question raised in the latter case is one of statutory interpretation. It has been suggested that when the victim dies testate the only question is one of the intent of the testator. Under this theory, a clause is implied upon the presumed intent of the testator forfeiting the gift if the beneficiary murders the testator.<sup>10</sup> Yet, if the will specifically provided that the beneficiary was to get the gift if he murdered the testator, the question would still remain, is the will void as a matter of public policy? And, as when the victim is intestate we seek to interpret

<sup>5</sup>See *Riggs v. Palmer*, *supra*, note 4.

<sup>6</sup>For an application of this maxim in this class of cases, see *Box v. Lanier*, 112 Tenn. 393 (1903).

<sup>7</sup>This distinction was suggested in *Holloway v. McCormick*, *supra*, note 2, and in the *Matter of Wolf*, *supra*, note 4, but was ignored in the following cases, *Perry v. Strawbridge*, *supra*, note 4; *Johnson's Estate*, *supra*, note 2; *Box v. Lanier*, *supra*, note 6; *Estate of Hall*, *supra*, note 3; *Lundy v. Lundy*, *supra*, note 3.

<sup>8</sup>See Mat. 21:38; Mark 12:7; Luke 20:14.

<sup>9</sup>*Wall v. Pfanschmidt*, *supra*, note 2; *McAllister v. Fair*, *supra*, note 2; *Shellenburger v. Ransom*, *supra*, note 2; *Deem v. Millikin*, *supra*, note 2; *Carpenter's Estate*, *supra*, note 2.

<sup>10</sup>See note 30 L. Q. R. 211, and 9 Ill. L. R. 502.

the statutes of descent, so now we must interpret the statute of wills,—is omission to provide for this contingency accidental or intentional? The question of the implied intent of the testator arises only secondarily.

Insurance cases seem to be in a class by themselves. The courts hold with practical unanimity that a slayer cannot recover on a policy on his victim's life. Where the policy was taken out with the intent to kill the insured, there is plainly fraud on the company,<sup>11</sup> and if the killing is intentional there is fraud even though the policy was taken out in good faith.<sup>12</sup> In the absence of intent to kill, there would seem to be no forfeiture of the proceeds of the policy.<sup>13</sup>

The New York cases<sup>14</sup> contain a suggestion that the murderer be allowed to inherit according to the will or the intestate laws but that he be compelled to hold the inheritance as a trustee *ex maleficio* for the benefit of those who would otherwise inherit. This suggestion, though ingenious, has truly been said to be as much forfeiture as though the murderer were technically deprived of his right to inherit.<sup>15</sup> If such result is desired, it would seem better to accept avowedly the doctrine that the murderer is barred from obtaining the fruits of his crime.

The most satisfactory solution seems to be an express statutory enactment preventing the slayer from profiting by the fruits of his crime.<sup>16</sup> This satisfies the instinctive feeling that the murderer should not be allowed to profit by his crime, without need of a strained statutory interpretation that verges on judicial legislation. Such statutes should be carefully worded, since by their passage, the legislature has plainly taken the matter under consideration, and no stretching of the theory of "rational interpretation" can bring about forfeiture in cases not clearly within the statute.<sup>17</sup>

L. I. Shelley, '17.

*Real Property: Easements: Acquisition by Diversion of Stream.*—Is a fee owner liable to give an irrevocable easement in his land without his knowledge or consent, merely by adverse use for a period less than

<sup>11</sup>Prince of Wales Co. v. Palmer, 25 Beav. 605 (1858); Burt v. Union Ins. Co., 187 U. S. 362 (1902).

<sup>12</sup>Schreiner v. High Court, 35 Ill. App. 576 (1890); Schmidt v. Northern Life, 112 Iowa 41 (1900); Mutual Life v. Armstrong, 117 U. S. 591 (1885). As to fraud on the company vitiating the policy, compare with Supreme Commandery v. Ainsworth, 71 Ala. 436 (1882), suicide; Hatch v. Mutual Life, 120 Mass. 550 (1876), submission to an illegal operation; Ritter v. Mutual Life, 169 U. S. 139 (1897), suicide.

<sup>13</sup>Holdon v. Ancient Order, 159 Ill. 619 (1896).

<sup>14</sup>Riggs v. Palmer, *supra*, note 4; Ellerston v. Westcott, 148 N. Y. 149 (1896).

<sup>15</sup>Wall v. Pfanschmidt, *supra*, note 2.

<sup>16</sup>Such statutes exist in California, Iowa, Indiana, Tennessee, and other American jurisdictions.

<sup>17</sup>Under such statutes it has been held that a person convicted of manslaughter is not convicted of murder, Estate of Kirby, 162 Cal. 91 (1912); the widow takes a distributive share as a matter of right and of contract, and not by inheritance, Kuhn v. Kuhn, 125 Ia. 449 (1904); accord, Mertes' Estate, 104 N. W. (Ind.) 753 (1914); the survivor of an estate by the entireties does not take by descent, Beddington v. Estill, 118 Tenn. 39 (1906).

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that required by the statute of limitations? This question was recently raised in the case of *Johnk v. Union Pacific R. Co.*, 157 N. W. (Neb.) 918 (1916). In that case a stream which for a long time had flowed almost parallel to the defendant's tracks, was caused to leave its old channel and flow across B's land into a ditch along the right of way. The above described change was due partly to a ditch B had built across his property and partly to a flood or freshet. Four years after this change had taken place, three years of which the defendant company was cognizant of the fact, the latter became aware that the flow was damaging its road bed and endangering the lives of its passengers. Steps were immediately taken to restore the stream to its original channel, and hence this suit by the lower riparian owners of the ancient watercourse to prevent such action.

The court held that an easement to have the water continue to flow on property of the railroad was created. The basis of the decision was that the defendant was allowed a reasonable time to stop the new channel and prevent the creating of an easement. The jury found against the railroad company.

At an early date the doctrine of acquiring title by prescription became prevalent in England. At first, in order to create such a title the adverse possession must have continued immemorially, that is, had its commencement before the reign of Richard I. Later the required period of adverse possession was lessened, and now it is prescribed by statute. The courts have always held that in order to create an easement by prescription there must be an adverse use for the same period as that required to secure a prescriptive right in corporeal property<sup>1</sup>; at such time a grant to continue using the property is presumed.<sup>2</sup>

A homely example of an easement by prescription is where A crosses B's land and continues to do so for the period prescribed in the statute of limitations without objection from B who has knowledge of the fact. A then obtains the right to continue to do so. A grant of the right to cross B's property is presumed from B to A.

So if the water of a stream is diverted into an artificial channel, and this changed condition continues for twenty years or the analogous time as prescribed by the different statutes of limitations, such stream cannot be restored to its ancient bed to the detriment of those who formerly were lower riparian owners.<sup>3</sup> A grant is presumed by the parties over whose land the stream is flowing in its new course to allow the water to continue to so flow.<sup>4</sup>

A few jurisdictions make an exception in the case of public highways to the requirement that the adverse use must be for the statutory

<sup>1</sup>*Sargent v. Ballord*, 9 Pick. (Mass.) 251 (1830); *Melon v. Whitney*, 10 Pick. (Mass.) 295 (1830); *Pierre v. Fernald*, 26 Maine 436 (1847); *Rooker v. Perkins*, 14 Wis. 85 (1861); *Tootle v. Clifton*, 22 Ohio St. 247 (1871).

<sup>2</sup>*Morse v. Williams*, 62 Maine 445 (1874); *Linen v. Maxwell*, 67 N. H. 370 (1892); *Daveis v. Collins*, 43 Fed. Rep. 31 (1890).

<sup>3</sup>*Matheson v. Ward*, 24 Wash. 407 (1901); *Mathewson v. Hoffman*, 77 Mich. 420 (1889); *Delaney v. Boston*, 2 Har. (Del.) 489 (1839); *Gould, Waters* (3d ed.) 225; *Belnap v. Trimble*, 3 Paige (N. Y.) 577 (1832); *Hollett v. Davis*, 54 Wash. 326 (1909); *Smith v. Musgoove*, 32 Mo. App. 241 (1888).

<sup>4</sup>*Supra*, note 2.



period. They hold that the right to use property as a public highway is obtained after a term of adverse use sufficient to satisfy the jury that the public was justified in treating the same as a public dedication. This exception is sometimes extended to streams because of the interest which the public generally have in them.<sup>5</sup> This exception cannot be availed of here, however, as grounds for the decision, because Nebraska makes no exception to the case of highways.<sup>6</sup>

It is hard to see any reasons upon which the court in the principal case bases its conclusion. Why should the legislature enact the law requiring the adverse use or possession for ten years if it is only going to be heeded at the whim of the court? It would seem that the legislature regarded ten years as a reasonable time. In fact in a previous Nebraska case<sup>7</sup> the court held that an easement by prescription could only be effected by an adverse use for ten years. The court does not in any way distinguish the two cases. On the contrary it appears to lay down the arbitrary rule that the defendant is given a reasonable time to restore the stream. What consists of a reasonable time is to be determined by the jury. The court appears to have exceeded its authority and to have been legislating rather than acting in a judicial capacity.

The title to real property has always been considered the most sacred and stable part of the law. A change in title is only effected with the utmost solemnity. Still in the *Johnk* case, the plaintiff secures an easement in the defendant's land after four years of adverse use.

It certainly is a very harsh rule and, if applied to all cases, would keep the owner of realty constantly on his guard for fear that an easement would be secured against his property. Even the judges in the Vermont cases<sup>8</sup> which held there was an easement created where there had been an adverse use for eight and ten years on the ground that the servient landowners were given a reasonable time to stop the creation of the right, would regard the case of *Johnk v. Railroad Company* with surprise, if they realized that such an uprooting of the stability of real estate ownership would be the outcome of their decisions.

A. A. Atwood, '17.

*Sales: Judgment for the Purchase Price no Bar to Retaking Goods in Conditional Sale.*—The New York Court of Appeals in *Ratchford v. Cayuga County Cold Storage and Warehouse Co.*, 217 N. Y. 565 (1916), took a stand with the minority of states that favor allowing the seller of goods on a conditional sale contract to replevy the goods after having entered judgment for the purchase price. With all respect to the learned court, it is difficult to follow the reasoning contained in the opinion. The court says, in part:

<sup>5</sup>Ford v. Whitlock, 27 Vt. 265 (1855); Woodbury v. Short, 17 Vt. 387 (1845).

<sup>6</sup>Graham v. Flynn, 21 Neb. 229 (1887); Nelson v. Sneed, 76 Neb. 201 (1906); Smith v. Nofsinger, 86 Neb. 834 (1910).

<sup>7</sup>Roe v. Howard County, 75 Neb. 448 (1906).

<sup>8</sup>*Supra*, note 5.

"Where to inconsistent remedies, proceeding on irreconcilable claims of right, are open to a suitor, the choice of one bars the other. But to have that effect the remedies must be inconsistent. We find no inconsistency here. \* \* \* There is no inconsistency between an attempt to get the money and a reservation of title if the attempt is unsuccessful."

It is not the result reached by the Court of Appeals that is here criticized, but the reasoning set forth in the opinion to sustain that result. It is open to debate whether suit and entry of judgment upon a debt is not something more serious and fraught with consequences than "an attempt to get the money."

A majority of the states hold that there must be an election between *suing for the purchase price* and retaking the goods upon default in the payment of installments and that the pursuit of one remedy bars the other.<sup>1</sup> Most contracts of this type embody a clause permitting the vendee to declare all installments due if there is a default in the payment of any one of them. In a large number of cases the chattels may be in such condition, after some months of use by the vendee, that the seller will prefer to collect the purchase price rather than reclaim the goods and perhaps have to sell them for what they will bring at a public sale. By the decision in the principal case he may do both providing that his judgment for the purchase price remains unsatisfied.

That suit for the purchase price vests the property in the vendee is based, of course, on the theory that some consideration for the promise to pay the price must be shown and that such consideration necessarily is the transfer of the property to the buyer. This view is opposed to that of the minority of states which hold that entry of judgment for the price does not bar a later retaking if the judgment cannot be collected.<sup>2</sup> It is argued that the consideration for the

<sup>1</sup>Ala.—Davis v. Millings, 141 Ala. 378 (1904); Ark.—Butler v. Dodson, 78 Ark. 569 (1906); Cal.—Parke & Lacy Co. v. White River Lumber Co., 101 Cal. 37 (1894); Conn.—Crompton v. Beach, 62 Conn. 25 (1892); Del.—Watertown Steam Engine Co. v. Davis, 5 Houst. 218 (1875); D. C.—Smith v. Gilmore, 7 D. C. App. 192 (1895); Fla.—American Process Co. v. Florida White Pressed Brick Co., 56 Fla. 116 (1908); Ida.—Pease v. Teller Corp., 22 Idaho 867 (1912); Ind.—Smith v. Barber, 153 Ind. 322 (1899); Iowa—Richards v. Schreiber, 98 Iowa 422 (1896); Kan.—Moline Plow Co. v. Rodgers, 53 Kan. 743 (1894); Mass.—Bailey v. Hervey, 135 Mass. 172 (1883); Frisch v. Wells, 200 Mass. 429 (1908); Mich.—Butler v. Trader, 75 Mich. 295 (1889); Mo.—20th Century Mach. Co. v. Excelsior Springs Mineral Water and Bottling Co., 171 S. W. 944 (1914); Minn.—Skoog v. Mayer Bros. Co., 122 Minn. 209 (1913); Neb.—Frederickson v. Schmittroth, 112 N. W. 564 (1907); N. D.—Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516 (1904); Ohio—Albright v. Meredith, 58 Oh. St. 194 (1898); Pa.—Seanor v. McLaughlin, 165 Pa. 150 (1894); S. C.—Standard Sewing Mach. Co. v. Alexander, 68 S. C. 506 (1903); S. D.—Sioux Falls Adjustment Co. v. Aikens, 142 N. W. 651 (1913); Tex.—Bank v. Thomas, 69 Tex. 237 (1887); Wash.—Winton Motor Carriage Co. v. Broadway Automobile Co., 118 Pac. 817 (1911).

<sup>2</sup>Fed.—Arctic Ice Mach. Co. v. Armstrong, 192 Fed. 114 (1911); Ala.—Thomason v. Lewis, 103 Ala. 426 (1893); Ga.—Moon v. Wright, 78 S. E. 141 (1913); Mass.—Miller v. Hyde, 161 Mass. 472 (1893); Mich.—Fuller v. Byrne, 102 Mich. 461 (1894); Miss.—McPherson v. Acme Lumber Co., 70 Miss. 649 (1893); N. J.—Campbell P. P. & Mfg. Co. v. Rockaway Pub. Co., 56 N. J. L. 676 (1894); Vt.—Mathews v. Lucia, 55 Vt. 308 (1883).

promise on the part of the vendee to pay is the vendor's promise to convey upon payment. According to this view, then, a suit for the price is a sort of action for specific performance, the property in the goods remaining in the vendor until the execution is satisfied. Another theory of the minority that has some basis is admirably stated in Williston on Sales as follows: "The reservation of title is for the purpose of securing the price. The transaction is in its essence the same as a chattel mortgage given by the buyer on the purchased property to secure the price. \* \* \* Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it: that is—for the purpose of endeavoring to realize from it the full amount due him."<sup>3</sup>

In answer to this it may be said that if suit for the purchase price is to vest the property in the vendee and the seller is to replevy and hold it as a sort of trustee, an execution should be levied and the property sold by the sheriff in the regular course of procedure. Unless a new variety of lien is to be read into the law the vendor will not be protected between the time of entry of judgment and the replevin proceeding as against prior judgment creditors. The advantage of allowing retaking under such circumstances is not clear. Furthermore it is obvious that, if the buyer is to be considered as the owner of the goods after entry of judgment, some provision must exist for the buyer's protection compelling a public sale of the goods after replevin. Only a few states at present have such statutes. As has been said, however, not many of the minority states have adopted this somewhat artificial view but allow the seller to retake as his own.

The law in New York as to election of remedies has been unsettled until the decision in the principal case. No case squarely presenting the situation here discussed has been decided by the Court of Appeals until the present time. The Supreme Court and the Appellate Division have held that suit for the price bars retaking.<sup>4</sup> It is perhaps worthy of note that Judge Seabury concurred in the opinion in *Orcutt v. Rickenbrodt*,<sup>5</sup> which is directly *contra* to the opinion in the principal case in which he also concurred.

In the states which hold that suit for the price bars retaking it is interesting to note the variance that exists as to the exact moment when the property is deemed to have passed to the buyer. The commencement of the action by service of summons has been considered sufficient to vest ownership in the vendee.<sup>6</sup> Filing a claim

<sup>3</sup>Williston on Sales, Note to Sec. 571.

<sup>4</sup>Shipley Const. & Supply Co. v. Mager, 165 App. Div. (N. Y.) 866 (1914); Pels v. Oltarsh Iron Wks., 129 N. Y. Supp. 371 (1911); Avery v. Chapman, 127 N. Y. Supp. 721 (1911); Orcutt v. Rickenbrodt, 42 App. Div. 238 (1899); Wright v. Pearce, 4 Hun (N. Y.) 351 (1875); Kirk v. Crystal, 118 App. Div. (N. Y.) 32 (1907), where filing of mechanics lien was held to vest property in the vendee.

<sup>5</sup>42 App. Div. (N. Y.) 238 (1899).

<sup>6</sup>Alden v. Dryer, 92 Minn. 134 (1904); Orcutt v. Rickenbrodt, *supra*, note 3; Avery v. Chapman, *supra*, note 3; Frisch v. Wells, *supra*, note 1.

against a decedent's estate<sup>7</sup> and filing a claim in bankruptcy have had the same result.<sup>8</sup> Judgment is regarded as the line of demarcation in *Twentieth Century Mach. Co. v. Excelsior Springs Mineral Water and Bottling Co.*<sup>9</sup> In some of the minority states attachment or levy upon the goods will do that which the judgment alone will not, namely, cause the property to pass to the buyer.<sup>10</sup>

A somewhat bewildering discussion is found in the opinion in *Arctic Ice Machine Co. v. Armstrong County Trust Co.*,<sup>11</sup> in which it is set forth that filing a mechanic's lien does not constitute an election. The learned judge admits that to file a lien and to retake the goods are inconsistent remedies but declares that the law will regard the former as a "mistake" if the vendor reconsiders and wishes to pursue his other remedy.

The outstanding fault of this branch of the law of conditional sales, as well as of most branches of it, is its lack of uniformity. This unfortunate state of affairs will, it is hoped, be remedied by the proposed Uniform Conditional Sales Act drawn by Professor Bogert of the Cornell University College of Law, which is now before the Conference of Commissioners on Uniform State Laws. Section 19 of the new law reads as follows: "The retaking of possession \* \* shall be deemed an election by the seller to rescind the contract of sale and the buyer shall not be liable thereafter for the price except as provided in Section 17. The bringing of an action by the seller for the recovery of an installment or the whole of the price shall not be deemed inconsistent with a later retaking of the goods. \* \*"

As to the effect of election by the seller to retake the goods upon the buyer's default it is generally held that such retaking acts as a rescission of the contract and cancels the buyer's obligation to pay the purchase price.<sup>12</sup>

The provisions in the proposed Uniform Conditional Sales Act would serve to clear up the present uncertainty regarding the rights of the vendor and vendee by amply protecting the security of the seller and at the same time preventing imposition upon the buyer.

From a comprehensive view of the large mass of authority it seems that there was little occasion for the Court of Appeals to disregard the weight of precedent in deciding the principal case. It points out no advantage to be gained by allowing retaking after judgment. The better rule seems to be to regard the transfers of the property as occurring at the time of service of the summons, there being no logical reason for considering the transfer delayed until the entry

<sup>7</sup>Holt Mfg. Co. v. Ewing, 109 Cal. 353 (1895).

<sup>8</sup>Crompton v. Beach, *supra*, note 1; American Process Co. v. Florida White Pressed Brick Co., *supra*, note 1; Smith v. Gilmore, *supra*, note 1.

<sup>9</sup>117 S. W. (Mo.) 944 (1914).

<sup>10</sup>Thomason v. Lewis, *supra*, note 2, but see Mathews v. Lucia, *supra*, note 2.

<sup>11</sup>192 Fed. 114 (1911).

<sup>12</sup>Bell v. Old, 113 S. W. (Ark.) 1023 (1908); Glisson v. Heggie, 105 Ga. 30 (1898); Turk v. Carnahan, 25 Ind. App. 125 (1900); Keystone Mfg. Co. v. Casselius, 74 Minn. 115 (1898); Cooper v. Payne, 190 N. Y. 512 (1906); Kelly-Springfield Road Roller Co. v. Schlimme, 220 Pa. 413 (1908); Stewart & Holmes Drug Co. v. Ross, 74 Wash. 401 (1913).

of judgment. Then if no other property is available the goods can be seized and sold under execution with no detriment, in theory at least, to either vendor or vendee.

Donald H. Hershey, '18.

*Trusts: Remedy of a Creditor of a Spendthrift Trust.*—The case of *Jenks v. Title Guarantee and Trust Company*, 170 App. Div. (N. Y.) 830 (1915), serves to recall to the attention of the bar an uncertainty which seems to affect the law in New York pertaining to the remedy of a creditor of a trust estate.

The trustee of the bankrupt estate of one Buchanan, for whose benefit two spendthrift trusts had been created, brought action against the trustee of the said trust, to reach the surplus income of the beneficiary.

The court, Ingraham, P. J., dissenting, held that there could be a recovery of all income over and above the amount necessary for the suitable support of the defendant and those dependent upon him which amount the court placed at from \$9,000 to \$12,000 per year.

The important fact to be noted concerning this case is that the court based its holding on section 98 of the New York Real Property Law. Up to this time it had generally been thought that section 98 had been impliedly repealed by section 1391 of the Code of Civil Procedure.

Section 98 of the New York Real Property Law<sup>1</sup> provides in part that the surplus of the income from a trust estate "*beyond the sum necessary for the education and support of the beneficiary*, shall be liable to the claims of his creditors in the same manner as other personal property which cannot be reached by execution."

Section 1391 of the Code of Civil Procedure as amended in 1908<sup>2</sup> provides that income from a trust estate to the amount of \$12 or more a week may be garnished by a judgment creditor to the extent of ten per centum thereof. This is *irrespective* of whether the beneficiary's income is more than sufficient to provide for his education and support.<sup>3</sup>

In 1877 the case of *Williams v. Thorn*<sup>4</sup> by judicial interpretation made section 98 applicable to personal property; and in 1911 the United States Bankruptcy Act was amended so as to vest trustees of bankrupts "with all the rights remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."<sup>5</sup>

The uncertainty which has hitherto prevailed in New York in regard to the remedy of a trust creditor can be directly traced to the case of *Brearly School v. Ward*.<sup>6</sup> In that case an application based on the code amendment was made and granted to garnishee the

<sup>1</sup>Consolidated Laws 1909, chap. 50.

<sup>2</sup>A previous amendment to section 1391 of the code provided for the garnishment of trust incomes to the amount of \$20 or more per week. See Laws 1903, chap. 461.

<sup>3</sup>Heppenstall v. Boudouine, 73 Misc. (N. Y.) 118 (1911).

<sup>4</sup>70 N. Y. 270, 273 (1877).

<sup>5</sup>36 U. S. Stat. at Large 840, sec. 8 (1910).

<sup>6</sup>201 N. Y. 358 (1911).

income of a *cestui que trust*. The question before the court at that time was whether there was a constitutional impediment in the way of the retroactive operation of section 1391 of the code.<sup>7</sup> The question whether section 98 had been impliedly repealed by section 1391 was not then necessary for decision, but in an interesting *dictum* the court, by Willard Bartlett, J., said<sup>8</sup> that the exemption provided for in section 98 "to the extent of ten per cent. of the trust income *has now been repealed* by the code amendment in question."

It was this statement which caused lawyers generally to think that section 98 had been impliedly repealed.

But a review of the cases in New York since the code amendment of 1908 will show that section 1391 did not repeal section 98, but was intended to be used concurrently with it.

That the Court of Appeals did not intend to convey the meaning that section 1391 had impliedly repealed section 98 was evidenced by the fact that a week after deciding the Brearly case the same court held in *Matter of Ungrich*<sup>9</sup> that the income of a trust estate could be reached *either* by an action to impound the surplus beyond the requirements of the beneficiary for his support *or* by a special execution under section 1391 of the code.

A statement to the same effect was made by a Federal court in *In re Burtis*.<sup>10</sup>

In *Heppenstall v. Baudouine*<sup>11</sup> it was expressly held that section 1391 of the code did *not* impliedly repeal section 98 but that the two remedies are concurrent; and a recovery was accordingly permitted under section 98.

In *Demuth v. Kemp*<sup>12</sup> recovery was refused under section 98, but this was not because section 98 was considered as repealed, but because the plaintiff failed to show what was reasonably necessary for the support of the judgment debtor, and therefore the court had no evidence on which to base a finding.

On an appeal of the *Demuth* case<sup>13</sup> it was said by Stapleton, J., that the purpose of section 1391 was to measure the *quantum* of the income of the trust fund, thereby avoiding the necessity of resorting to equity jurisdiction to ascertain the surplus income. Recovery was had by the plaintiff under section 1391.

In *Ellis v. Chapman*<sup>14</sup> recovery was not allowed under section 1391 because the income under the trust fund was less than twelve dollars a week, but it was said in the dissenting opinion of Laughlin, J., that the purpose of section 1391 was "*to extend*"<sup>15</sup> the law in favor of judgment creditors so as to reach a percentage of the income which might be necessary for the support and maintenance of the beneficiary."

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<sup>7</sup>Heppenstall v. Baudouine, *supra*, note 3.

<sup>8</sup>At page 364.

<sup>9</sup>201 N. Y. 415, 419 (1911).

<sup>10</sup>188 Fed. 52 (1911).

<sup>11</sup>*Supra*, note 3.

<sup>12</sup>159 App. Div. (N. Y.) 422 (1913).

<sup>13</sup>165 App. Div. (N. Y.) 77 (1914).

<sup>14</sup>165 App. Div. (N. Y.) 79 (1914).

<sup>15</sup>At page 87.

To sum up then, it seems that the purpose of section 1391 was not to repeal section 98, but merely to *extend* the law in favor of judgment creditors;<sup>16</sup> to garnishee the income of the *cestui*, *irrespective* of whether the income was more than sufficient to provide for the debtor's maintenance;<sup>17</sup> in other words to avoid the necessity of resorting to equity to ascertain the amount of such surplus.<sup>18</sup>

There are times when the one remedy is better, and times when the other is more desirable. For instance, in the *Jenks* case the beneficiary had an income of \$23,000. The court held that \$9,000 was necessary for the support of himself and those dependent on him.<sup>19</sup> This left \$14,000 a year to be applied to the claims of his creditors. Had the proceedings been under the code, the creditors would have gotten only \$2,300 a year. Suppose, on the other hand, that the beneficiary's income had been only \$9,000. Since this amount was necessary for his support, his creditors would have gotten absolutely nothing under section 98, while under section 1391, they would have received \$900.

That the two remedies are not inconsistent has already been held.<sup>20</sup> It is certain, however, that so important a statutory expression as section 1391 "ought not be left obscurely contained in a long section of the Code of Civil Procedure;"<sup>21</sup> nor should section 98 be left without the addition of its complement, the code remedy.

It would seem that both sections should be repealed, and a new section enacted to embody the expressions of both provisions as they exist today, so that hereafter the alternative remedies may be easily found and recognized.

Henry Klauber, '17.

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<sup>16</sup>*Supra*, note 15.

<sup>17</sup>*Heppenstall v. Baudouine*, *supra*, note 3.

<sup>18</sup>*Demuth v. Kemp*, *supra*, note 13.

<sup>19</sup>The determination of the amount necessary for the support of the beneficiary is arrived at by taking into account his habits of living (*Andrews v. Whitney*, 82 Hun (N. Y.) 117, 123 (1894), and the locality of his residence (*Tolles v. Wood*, 16 Abb. N. C. (N. Y.) 1, 13 (1885))).

<sup>20</sup>*Heppenstall v. Baudouine*, *supra*, note 3.

<sup>21</sup>See consolidator's note under section 98 of the N. Y. Real Property Law, *supra*, note 1.